The Central Law Journal.

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THE annual meeting of the Missouri Bar Association, held in St. Louis last week, was interesting and instructive. But it is to be regretted, that the attendance of members was so small, there being fewer present than at any meeting heretofore held. This may be due to the fact, that the meeting was fixed for a time in the year when many attorneys find it impossible to leave work, incident to the preparation of cases for the opening of court. What the meeting lacked in numbers, however, was fully made up in enthusiasm and interest, and it may be truthfully said that at no meeting have there been more able addresses or more valuable discussions. We cannot undertake, at this time, to give more than a *resume* of what was done, intending, upon the publication of the proceedings and addresses, to notice them more at length. The address of Jas. B. Gantt, president of the association, contained some excellent recommendations. His criticism of the Mechanics' Lien Law of this State, and the diversity of the opinions, on that subject, between the court of appeals and the supreme court, were well timed and heartily indorsed. He also recommended the passage of an act making instructions of court, motions in arrest and for new trial, part of the record of a case.

The committee on judicial administration reported, through its chairman, Mr. F. N. Judson, in favor of the proposed constitutional amendment for the relief of the State supreme court. A much complimented paper was read by Mr. Henry W. Bond, on "Equity Functions under the Code," and Mr. Jno. M. Holmes entertained the members by an address on "Changes in the Law of Coverture." Mr. E. P. Gates amused, as well as instructed, by an excellent paper on "Our Divorce Laws," in which he had diligently collected many remarkable instances of the effect of our existing laws. Valuable debates were had on the proposed constitutional amendment, on the question, Is a majority verdict advisable? and the question whether the judicial circuits of the State should be decreased and the judges salaries increased. The election of officers for the ensuing year resulted as follows: President, Geo. A. Madill; secretary, Chas. Claflin Allen; treasurer, Wm. C. Marshall; executive committee, Chas. G. Burton, W. A. Wood and W. T. Johnson. Mention might be made of the banquet which followed, as it was exceptionally fine and greatly enjoyed.

THE debate on the merits of the constitutional amendment, submitted by the last legislature to the people, to be voted on next year, provoked considerable discussion. This amendment is intended to relieve the docket of the supreme court, now overcrowded. It provides in substance for a court of seven judges, divided into two divisions, having concurrent jurisdiction of all causes, except that division number two shall have exclusive cognizance of all criminal cases. On page 295 of this issue will be found the text of this amendment. The meeting developed but little opposition to the amendment, and, on the part of many, the feeling seemed to be that, though not entirely satisfactory, the remedy proposed was all that appeared in sight, and that the present condition of things demanded immediate change. A large number, however, spoke enthusiastically in its favor, and a resolution commending it, passed almost unanimously.

THE dissenting opinion of Chief Justice Ray, of the Missouri Supreme Court, in the case of Rychlicke v. City of St. Louis, which we publish on page 289 of this issue, in the form and in lieu of a note appended to that case, will be found of interest to practitioners everywhere, not only on account of its ability and exhaustiveness, but also because of the very great importance of the subject—the right of a municipal corporation to drain and discharge water over the lands of an adjoining proprietor. Judge Ray takes the position, as against the conclusion of the court, that the right of an owner of land to occupy and improve it in such manner as he sees fit, is not restricted or modified by the fact that

his own land is so situated with reference to that of adjoining lands that damage is bound to accrue to the latter. And this seems to be the view adopted by a majority of the courts in this country, and the one which, upon a study of Judge Ray's opinion, would seem to be reasonable.

NOTES OF RECENT DECISIONS.

THE liability of corporate stock to attachment, in the hands of a *bona fide* purchaser, for a judgment obtained against the original owner, was considered by the Supreme Court of Alabama, in Berney National Bank v. Pinckard. It was there held that an attaching creditor who perfects his lien by the recovery of a judgment is a *bona fide* creditor from the inception of his lien, and that where the purchaser of corporate stock fails to have it transferred on the company's books within fifteen days, the stock becomes liable to attachment at the suit of any creditor of the person in whose name the stock stood on the books. The court says:

Cases have been before us in which controversies have arisen between parties claiming to be transferees of stock in corporations and creditors of the transferrers. The following are some of the cases: Nabring v. Bank, 58 Ala, 204, in which the transfer had been made on the books of the company. No question arose in that case which is material to the present one. Jones v. Latham, 70 Ala. 164, was the case of a creditor having an execution, followed by a levy on the stock. We held that the bill was imperfect for the want of necessary averments. In that case we interpreted section 2043 of the Code of 1876, (section 1670, Code 1886.) and ruled that the word "creditors" in that section meant judgment creditors haveing a lien. No question of attachmeat lien arose in that case, for none had been issued. A judgment had been recovered against Rushing, in whose name the stock had been issued, and still stood on the book of the corporation, and there was an execution on the judgment, levy, sale, and purchase by Jones. The bill in that case, like the present one, was filed by the alleged purchaser of the stock from Rushing, and sought to compel a transfer of the stock to him (Latham). We interpreted the one section, 2043, of the Code of 1876, and held that the word "creditor" in that section meant a judgment creditor having a lien. As we have said, we did not and could not consider the effect of an attachment levy, for the record presented nothing of the kind. Fisher v. Jones, 82 Ala. 117, 3 South Rep. 13, was the case of attachment levied on the stock, and the question whether the attachment lien would prevail over a prior sale of the stock which had not been transferred on the books of the corporation was approached, but not decided. We held that there had been a transfer of the stock on the books of the corporation before the attachment was levied, and this rendered a decision of the other question unnecessary. Which of the rights will prevail over the other is an open question in this court, so far as any direct and necessary decision of the question is concerned. The following are the facts of this case: Davin was indebted to the Berney National Bank, and on the 8th day of August, 1887, the bank sued out an attachment against him which, on the same day, was levied by the sheriff on 20 shares of the capital stock of the Bessemer Land & Improvement Company, a private corporation, under the laws of Alabama. The secretary of the Bessemer Land & Improvement Company had, on the demand of the sheriff, furnished him a written statement that on that day 20 shares of the capital stock stood on the books of the company in the name of Davin, defendant in attachment. When the attachment was levied on the stock, the sheriff immediately gave notice to the secretary of the company, and so indorsed in his return. The sheriff also stated in his return that "written notice of the above levy was this day given by me, in which notice the said W. W. Davin, defendant, was required to appear and plead or demur to the complaint filed in this cause within thirty days from this date." In the suit by the bank, judgment was recovered against Davin November 15, 1887, and under process issued for its collection the sheriff was about to sell the stock as the property of Davin. Under our statute the levy of an attachment creates a lien in favor of the plaintiff on the property or effects attached. Code 1876, § 3280; Code 1886, § 2957, and authorities cited. The lien, however is inchoate, and does not become complete and enforceable unless and until a judgment is recovered in the suit. 1 Brick. Dig 162, §§ 105, 108, 109, 113. The case made by the bill, and sustained by the proof, is as follows: Davin having possession of a cartificate of 20 shares of the capital stock of the Bessemer Land & Improvement Company, indorsed the same in blank, and the same was sold for a valuable consideration to Pinckard, De Bardelaben & Co. This was some time prior to the levy of the bank's attachment. Neither the secretary of the Bessemer Land & Improvement Company, the bank, nor any of its officers, had any notice of this sale until after the attachment was levied. After the levy but before the judgment was recovered against Davin, Pinckard, De Bardelaben & Co. presented the certificate to the secretary of the Bessemer Land & Improvement Company, and demanded that it be transferred to them on the books of the company. A by-law of the company had made provision for such transfer. The secretary refused to make such transfer, and the present bill was filed to compel him to do so, and to enjoin the sale of the stock under the bank's process. The city court, sitting in equity, granted the relief prayed. The levy of the attachment in this case being prior to the date when the Code of 1886 went into effect (December 25, 1887), the question of error *vel non* must be determined by the statutes as found in the Code of 1876.

In Jones v. Latham, 70 Ala. 164, in which the creditor claimed no attachment levy, but only a judgment, we said, speaking of section 2043 of the Code: "We have uniformly interpreted the words '*bona fide* creditors, in statutes like this, to mean judgment creditors having a lien." As we have said, that was not a question in that case. Possibly the proposition was stated too broadly, and was liable to mislead. But is not the Berney National Bank a judgment creditor having a lien? True, the judgment did not antedate the notice of transfer of the stock, but the attachment levied did, and when the lien became choate or complete by the recovery of the judgment, may it not be said that by

force of our statute it related back to the levy of the attachment, and fixed the lien as of that date? But we need not decide this. We think section 2043 of the Code of 1876 (section 1670, Code of 1886) must be construed in connection with other sections in the same chapter. Section 2041 provides that "the shares or interest of any person in any incorporated company are personal property, and transferable on the books of the company in such manner as is or may be prescribed by the charter, or articles of association, or by-laws and regulations, of the company, and such share or interest may be levied on by attachment or execution, and sold as goods and chattle; and the purchaser shall be the owner of the share or shares, or interest bought by him, and the officer making the sale shall transfer the same to the purchaser in writing, which shall be registered on the books of the company." See Code 1886, § 1673. Section 2044 of the Code of 1876 provides that "persons holding stocks not so transferred or registered * * * must have the transfer * * * made or registered on the books of the company, or, upon failing to do so within fifteen days, all such transfers * * * shall be void as to *bona fide* creditors, or subsequent purchasers without notice." Code 1886, § 1671.

We feel constrained to construe the foregoing provisions—*First*, as placing stocks in private corporations on the same footing as other personal chattels, as to their amenability to levy either under execution or attachment; *second*, that if a transfer of such stock is not recorded within 15 days after the transfer, then such transfer is void as to *bona fide* creditors, or subsequent purchasers without notice; and, *third*, that a judgment creditor having a lien, or an attaching creditor who perfects his lien by the recovery of judgment, is each a *bona fide* creditor from the inception of the lien. The question as to priority of lien was settled as we have declared it in Hardaway v. Semmes, 38 Ala. 657. See, also, Jordan v. Mead, 12 Ala. 247; Application of Thomas Murphy, 51 Wis. 519, 8 N. W. Rep.. 419; Weston v. Mining Co. 5 Cal. 186; Fisher v. Jones, 82 Ala. 117, 3 South Rep 13. We place our ruling above on the language of the statute, which, as we interpret it, accords equal efficacy to attachment levy, as it does to levy under execution. But a plaintiff in attachment levied does not thereby become a purchaser (Wollner v. Lehman, 85 Ala. 274), and can assert no claim as such. We have ruled above that, under our statutes, Pinckard, De Bardelaben & Co. were allowed 15 days after their purchase of the stock within which to have it transferred on the corporation books, and that, failing to do so within that time, the stock became liable to levy under execution or attachment at the suit of any creditor of Davin, in whose name the stock stood on the books.

MANDAMUS will not be granted to compel the circuit judge to grant a new trial where he has exercised his discretion and refused it, and where the negligence of defendant in not producing its principal witness at the trial stands confessed, declares the Supreme Court of Michigan, in Detroit Tug Co. v. Gartner. The court (Sherwood, C. J., and Campbell, J., dissenting) says:

It is not claimed by counsel for relator that the Detroit Tug & Wrecking Company is entitled to a new tria as a matter of right, nor is it pretended that the judgment which was rendered in the court below was not properly rendered upon the facts and law of the case. They admit their negligence in not being at the trial with their witnesses, but ask under their affidavits, in which they attempt to excuse their negligence, that the judgment may be set aside and a new trial awarded them as a matter of favor, expressing their willingness to submit to any terms which the court may impose as a condition of granting their favor. The motion, then, was not based upon a legal right, but was addressed purely and entirely to the discretion of the trial judge: In granting or refusing the motion the circuit judge exercised a judicial discretion, based upon testimony bearing upon the fact as to whether the wrecking company had sufficiently excused its negligence, and about which there was conflict in the affidavits. The history of judicial proceedings does not furnish a case when, under such circumstances, a court of last resort has held that the trial judge abused his discretion when he has decided without malice and according to the best of his ability upon the weight of the testimony. It is true that the constitution has given this court a general superintending control over all inferior courts, but in the exercise of this jurisdiction it has never been claimed that this court can substitute our discretion for that of the inferior tribunal, and compel it to exercise and enforce our descretion, and not theirs. This court has uniformly held that it has no authority to review the discretion of trial courts in granting or refusing new trials. Dibble v. Rogers, 2 Mich. 405; People v. Branch Circuit Judge, 17 Mich. 67; People v. Wayne Circuit Judge, 20 Mich. 220; Greeley v. Stilson, 27 Mich. 153; Johr v. People, 26 Mich. 426; People v. Saginaw Circuit Judge, 39 Mich. 123; Mabley v. Superior Judge, 41 Mich. 32; Mahoney v. People, 43 Mich. 39, 4 N. W, Rep. 546; People v. Francis, 52 Mich. 576, 18 N. W. Rep. 364; Gray v. Barton, 62 Mich. 186, 28 N. W. Rep. 813. Six of the cases above cited came before this court upon applications for *mandamus*. In People v. Branch Circuit Judge, which was an application for *mandamus*, this court said: "We are of opinion that there was not an entire failure of any showing, but on the contrary, there was something upon which the circuit judge was called upon to exercise his judgment; and, that being so, the question whether a new trial should be granted is one addressed to his discretion, and the supreme court has no authority to review his conclusion, and compel him by *mandamus*, to rescind his order." In People v. Wayne Circuit Judge, this court said: "As the motion was properly before the court below, we cannot review its decision on the facts so as to decide whether the new trial shall have been granted. It was a matter of discretion where the action of that court is not open to review." In People v. Saginaw Circuit Judge, this court held that "Discretion is not reviewable on *mandamus*." In Mably v. Superior Judge, a *mandamus* was asked to compel the superior court of Detroit to vacate an order setting aside a previous conditional order for a new trial. Campbell, C. J. said: "As we have no jurisdiction by *mandamus* to review the discretionary action of courts in such cases as that before us, we cannot grant the writ." In Mahoney v. People, Mr. Justice Graves said: "The refusal of the court to grant a new trial presents no question. * * * The application for the new trial was founded on matters pertaining to the discretion of the court, and not on the ground of absolute legal right." In People v. Francis, Mr. Justice Sherwood said: "We are not permitted to review the discretion of the circuit judge on motion for a new trial." * * * In the case of Peo-

ple v. Saginaw Circuit Judge, this court held that the discretion exercised by a circuit judge in opening a judgment by default was like the discretion exercised in granting a new trial. In Hays v. Bank, 21 Ind. 154, it was held that pressing business engagements were not sufficient excuse, on a motion to set aside default. In Macomber v. Mayor, etc., 17 Abb. Pr. 36, it was held at default should not be set aside unless there was a meritorious defense, and the omission was the result of accident or mistake without culpable negligence. In Jarvis v. Worick, 10 Iowa, 29, it was held that a default will not be set aside when the defendant's excuse really admits a want of diligence. See, also, Edwards v. McKay, 73 Ill. 570; Leather Co. v. Woodley, 75 Ill. 435; Schroer v. Wessel, 89 Ill. 114; Thacher v. Haun, 12 Iowa 303,

A plainer case of fault and inexcusable negligence on the part of a party having control of a cause in court cannot well be imagined. Besides, the facts upon which Samuel A. Murphy seek to exculpate himself are contradicted in material points by the affidavits of two persons. The circuit judge was called upon to pass upon and weigh the evidence produced before him upon the motion, and when that is the case, courts exercising supervisory jurisdiction have hitherto refused to interfere by *mandamus* with the discretion of the trial court. In King v. Justices of Devon, 1 Chit. 34, the court refused to compel a quarter sessions to enter continuances, saying: "Our powers are great; they are not unlimited; they are bounded by some lines of demarcation. I am not aware that we have any power to interfere with the jurisdiction of the court below in the way suggested." In the case King v. Justices of Middlesex, 4 Barn. & Ald. 300, ABBOTT, C. J., said: "There is not an instance which can be cited where the court have granted a *mandamus* to justices to compel them to come to any particular decision." So, in U. S. v. Judge Lawrence, 3 Dall, 53, which was an application for a *mandamus* to compel Judge Lawrence to issue a warrent to apprehend Captain Barre, the Supreme Court of the United States said: "We are clearly and unanimously of opinion that a *mandamus* ought not to issue. It is evident that the district judge was acting in a judicial capacity when he determined that the evidence was not sufficient to authorize his issuing a warrent for apprehending Captain Barre, and (whatever may be the difference of sentiment entertained by this court) we have no power to compel a judge to decide according to the dicates of any judgment but his own." And in Ex parte Hoyt, 13 Pet. 279, 290, Mr. Justice Story, speaking for the court, said: "It has been repeatedly declared by this court that it will not by *mandamus* direct a judge what judgment to enter in a suit, but but only will require him to proceed to render judgment." In Insurance Co. v. Adams, 9 Pet, 602, Chief Justice Marshall cites with approval the language made use of in the option given in the same case, reported in 8 Pet. 291, viz.: "On a *mandamus* a superior court will never direct in what manner the discretion of an inferior tribunal shall be exercised; but they will, in a proper case, require the inferior court to decide." To the came effect are: Com. v. Judges, etc., 3 Bin. 273; Com. v. Cochran, 5 Bin. 193; Swing v. Inhabitantes, etc., 10 N. J. Law, 58; County Court v. Daniel, 2 Bibb 573; Chase v. Canal Co., 10 Pick. 244. The cases in which this principal is asserted might be extended almost indefinitely from the earlier cases above cited to the present time, embracing the courts of every state and country, exercising jurisdiction over English speaking people.

HAWKERS AND PEDDLERS.

I. *Who are.*—Hawkers and peddlers are persons who carry merchandise about from place to place for the purpose of selling it, as opposed to persons who sell at an established shop.[1] It is generally understood from the word, that a hawker is one who not only carries goods for sale, but seeks for purchasers, either by out-cry, which is perhaps indicated by the derivation of the word, or by attracting attention to them as goods for sale by exhibition, placards or some conventional signal,[2] while the word peddler seems only to signify one who carries small commodities about on foot or in a cart or wagon and sells them,[3] but the two words are treated in law as synomymous; and a licensed auctioneer conveying goods from place to place and selling them at retail or by auction at different towns has been held to be a peddler.[4] Neither is it necessary that the goods should be carried by or taken with the seller, if he has the goods conveyed from place to place by public conveyance or otherwise, himself traveling by different means, or at different times or routes, he is still a hawker and peddler,[5] the central idea being the traveling about the country for the purpose of selling.[6]

So one who goes from house to house soliciting orders for the purchase of goods to be delivered in the future is likewise a hawker and peddler,[7] and it is immaterial what the medium of payment may be; one who barters goods for bones, rags and other similar articles, being a hawker and peddler as well as one who sells his goods for a money compensation.[8] But a producer selling the products of his industry, as a farmer, selling mutton produced on his farm, is not a hawker and peddler, unless he was at the time exercising his calling for the purpose of so disposing of the products;[9] and in England the law seems to be that a manufacturer and his servants

[1] Abb. L. Dict. (Hawkers); Bouv. L. Dict. (Hawkers.)
[2] Com. v. Ober, 12 Cush. (Mass.) 493.
[3] Webster's Dict. (unab).
[4] Rex v. Turner, 4 B. & A. (Eng.) 510.
[5] Atty-Genl. v. Woolhouse, 1 T. & J. (Eng.) 463, 12 Price, 65; Dean v. King, 4 B. & A. (Eng.) 517.
[6] Opinions of Attys-Gen'l. N. Y. (1842), 111.
[7] Graffty v. Rushville, 107 Md. 502, 57 Am. Rep. 128.
[8] Dune v. Gabb, 6 W. R. (Eng.) 497.
[9] Homewood v. Wilmington, 5 Del. 123.

and agents, selling goods of his own manufacture, are exempted from the rules applicable to hawkers and peddlers;[10] and the same rules being incorporated in the statutes of many of the United States, the restrictions being usually confined to the vending of goods of foreign manufacture.[11] Under this rule it was held in North Carolina that an admixture by boiling together certain drugs to form a nostrum is not a manufacture.[12] Neither is a solicitor, agent or drummer for a mercantile establishment, employed to go from house to house, or place to place, to solicit orders for or sell his principal's goods by sample, or otherwise, a hawker and peddler;[13] nor of course is one who sells goods for his own shop or store, there being no element of going about from place to place in the case.

II. *Restrictions Imposed upon Them.*—Hawkers are obliged under the laws of perhaps all the States to take out licenses and conform to the regulations which these laws establish.[14] These regulations being purely statutory differ in different States, but there is a general similarity between them. Hawking and peddling is usually prohibited by them under penalty of a fine, forfeiture of the goods being peddled or other punishment, but providing for the licensing of such calling by some tribunal or officer, duly authorized or established for that purpose. Such licenses are granted by a designated officer or body upon application, showing the manner in which the applicant intends to travel and trade, and the character of the articles he intends to sell, upon the payment of a specified fee, and providing for the punishment of the offender in case of the violation of the laws. In some States the prohibition is confined to goods of foreign manufacture.[15] Such a license is a special personal privilege, the tax thereby imposed being a tax on the calling, not on the goods, and is not therefore transferrable; and under the Mississippi and Pennsylvania statutes it is incumbent upon one hawking and peddling goods to take out a license, whether he be agent or owner,[16] while in the latter State the transfer of a license from one to another is forbidden.[17] What articles can be sold under such a license depends upon the judicial construction of the several statutes applicable thereto,[18] and if the amount of the license fee, which is usually fixed by the statute, is given for one year only, with no provision for a shorter time, the full year's fee must be paid even though the applicant wishes to sell only for a shorter period;[19] and this fee must be paid even though a tax has been paid upon the same goods by a firm of which the seller is a member.[20]

III. *Constitutionality and Effect.*—The laws requiring hawkers and peddlers to obtain a license and pay a fee therefor before practicing their calling are uniformly held to be constitutional, both with respect to the national constitution and the several State constitutions.[21] They must, however, be uniform and not discriminate in favor of one class or person in favor of another,[22] but a failure to establish a fee for a less term than one year, for the benefit of persons wishing to peddle for a short time only, is no violation of this constitutional principle of uniformity, they having, by procuring licenses, obtained the right to pursue their calling for a year, whether the business is commenced at or after the beginning of the year, or closed at or before the end of it, rests entirely with them.[23] These restrictions against hawking and peddling without a license are no interference with the right given by the United States statutes to vend a patented article,[24] and peddlers of patent medicines are required

[10] See Rex v. Farady, 1 B. & Ad. (Eng.) 275; Rex v. Manwaring, 5 M. & R. (Eng.) 57; 10 B. & C. 56.

[11] See 2 N. Y. R. S. (7th ed.) 1292; 2 Wag. Stat. (Mo.) 979, (1870); N. C. Laws, 1887, ch. 135, § 23. And see Osborn v. Holmes, 9 Pa. St. 333; Wolf v. Clark, 2 Watts (Pa.) 298.

[12] State v. Morrell (N. C.), 6 S. E. Rep. 418.

[13] City of Davenport v. Rice (Iowa), 39 N. W. Rep. 191; Kansas v. Collins, 34 Kan. 434.

[14] Bouv. L. Dict. (Peddlers.)

[15] See the statutes of the several States.

[16] Temple v. Sumner, 51 Miss. 13; Gibson v. Kauffield, 63 Pa. St. 168.

[17] Gibson v. Kauffield, 63 Pa. St. 168.

[18] See Com. v. Stevens, 14 Pick. (Mass.) 370; Hart v. Willets, 62 Pa. St. 15; District of Columbia v. Oyster, 4 Mackey (D. C.), 285, 54 Am. Rep. 275; Rex v. Hodgkinson, 10 B. & C. (Eng.) 73; 5 M. & R. 102.

[19] Hart v. Beauregard, 22 La. Ann. 238.

[20] Mayes v. Erwin, 8 Humph. (Tenn.) 290.

[21] Seymour v. State, 51 Ala. 52; Huntington v. Cheesebro, 57 Ind. 74; Taunton v. Taylor, 116 Mass. 254; Com. v. Ober, 12 Cush. (Mass.) 493; Borrough of Warren v. Geer 11 Pa. 415.

[22] St Louis v. Spiegel, 90 Mo. 587; Kneeland v. Pittsburgh 11 Pa. 657. And see Bouv. L. Dict. (Peddlers.)

[23] Hart v. Beauregard, 22 La. Ann. 238.

[24] Coldwater v. Russell, 49 Mich. 617, 43 Am. Rep. 478.

to take out licenses,[25] and a hawker's and peddler's license is no justification for the violation of a valid city ordinance.[26] And such restrictions are not unconstitutional as applied to agents selling and delivering articles manufactured outside of the State.[26a]

IV. *What Constitutes Hawking and Peddling.*—A single act of selling does not constitute hawking and peddling to such an extent as to make it necessary for the peddler to take out a license as such;[27] and taking orders for goods to be manufactured and making a sale of a few articles will not justify a charge of selling without a license;[28] neither will selling at private sale or at auction by regular auctioneers.[29] The act consists rather in the going about, and mere traveling accompanied by an offer to sell is *prima facie* sufficient; proof of actual sale is not essential,[30] and the carrying goods about and offering them for sale is, under the Connecticut statutes for the suppression of peddlers, considered as trading, dealing and trafficking.[31] On the trial of an indictments for carrying on the business of a trancient or itinerant dealer without a license, evidence of sales made in other counties than that named in the indictment may be given for the purpose of showing the itinerant nature of the business.[32] But erecting a tent and lecturing therefrom, and extolling the merits of goods and selling from a stock in the tent, but neither making nor soliciting any sales whatever outside, is not hawking and peddling under the Alabama statutes.[33] It is immaterial in what manner the goods may have been carried or transferred, the carrying of parcels of goods about on one's person,[34] and the selling of groceries from a canal boat[35] being hawking and peddling under the statutes, and rendering one engaging in such calling without a license liable, as well as where the goods are carried about in the usual manner. Selling goods by sample is not peddling.[36] But under the Maine statutes, traveling from town to town, or place to place in any town, carrying or offering for sale any goods, wares, or merchandise, whole or by sample, is hawking and peddling and renders the goods liable to forfeiture; but this does not apply to goods forwarded from without the State upon the order of a purchaser, even though such an order was given through an agent who was unlawfully traveling and offering goods for sale within the State.[37]

In England it would seem that the restrictions on hawking and peddling are confined to transactions carried on for profit, it being held that such going about and selling for the purpose of devoting the profits to religious purposes and to the benefit of schools, does not come within the statute.[38]

V. *Delegation of the Power by a State.*—A State may delegate its power to tax, restrain, or grant licenses to carry on a calling to a municipal corporation,[39] the right to confer the powers to tax employments being of the same character as the right to confer the power to tax property.[40] This is the case even though the State constitution, as in Illinois, expressly authorizes the State legislature to exercise the power without giving any direct and express authority to delegate the same;[41] but the municipal corporation cannot impose taxes upon, or grant licenses to carry on any occupation unless expressly or impliedly authorized so to do by its charter or the laws of the State,[42] and, as a general rule, where this power is conferred upon a municipal corporation, it cannot again delegate it to any person or body but must itself exercise it; its powers are conferred with the intention that they shall be exercised by the body created, and in the mode prescribed, and any departure from such authority or any attempt by the body to transfer its powers to others is unwarranted.[43]

[25] Laffer's Appeal, 13 Phila. (Pa.) 499.
[26] Com. v. Fenton, 139 Mass. 195.
[26a] State v. Richards (W. Va.), 28 Cent. L. J. 476.
[27] Rex v. Little, 1 Burr (Eng.), 609; 3 Ld. Ken. 317.
[28] Spencer v. Whiting, 68 Iowa, 678.
[29] State v. Belcher, 1 McMull (S. C.), 40.
[30] (1842) Opinions of Attys-Genl. (N. Y.) 111.
[31] Merriam v. Langdon, 10 Conn. 461.
[32] Shiff v. State (Ala.), 4 South. Rep. 419.
[33] Randolph v. Yellowstone Kit. (Ala.) 3 South. Rep. 706.
[34] Com. v. Cusick, 120 Mass. 183.
[35] Fisher v. Patterson, 13 Pa. St. 335.
[36] Com. v. Jones, 7 Bush (Ky.), 502.
[37] Burbank v. McDuffee, 65 Me. 135.
[38] Gregg v. Smith, 8 L. R. Q. B. (Eng.) 302; 42 L. J. M. C. 121; 28 L. T. 555; 21 W. R. 737.
[39] Osborne v. Mobile, 44 Ala. 493; Huntington v. Cheesbro, 57 Ind. 74; Kniper v. Louisville, 7 Bush (Ky.), 599; Taunton v. Taylor, 116 Mass. 254.
[40] Fretwell v. Troy, 18 Kan. 271.
[41] Wiggins v. Chicago, 68 Ill. 372.
[42] Mayor, etc. of Plaquemine v. Roth, 29 La. Ann. 261. And see Huntington v. Cheesbro, 57 Ind. 74.
[43] East St. Louis v. Wehring, 50 Ill. 23.

a Extent of the Delegated Power.—The character and extent of the power thus delegated to municipal corporations depends upon the wording and construction of their charters and the laws conferring it upon them. Thus, where a charter gives the corporation power to make all needful regulations respecting markets and market days, and the hawking and peddling of market produce and other articles, on a demurrer to a declaration, it cannot be said that such provisions were not broad enough to authorize the passage of an ordinance requiring book canvassers to take out a license; and under express authority to the council of such corporation to exact such by-laws, and make such rules, regulations and ordinances as shall be necessary to promote the peace, good order, benefit and advantage of such corporation, particularly providing for the regulation of the markets, streets, alleys, and highways, the council has power to pass such an ordinance.[44] An authority to collect taxes on auctioneers, transient dealers and peddlers, will justify the imposition of the tax, either upon the amount of the sales or in the form of a license to the auctioneer or peddler.[45] A city duly authorized to restrain and license hawkers and peddlers may compel one who peddles milk from door to door to take out a license and restrain unlicensed persons from so doing,[46] and such a dealer is a peddler, even though he has regular customers.[47]

It being the calling and not the property which is taxed, the corporate powers of a municipality extend to and comprise equally all persons plying the vocation within the corporate limits, whether they reside within them or not;[48] and a city authorized to tax all persons exercising within its bounds any profession, trade or calling, may impose a license tax upon persons selling butchers' meat therein, whether from stalls or shops or by peddling; and it may impose a tax upon their wagons used in the business, although agricultural products thus sold are exempt, and although farmers selling their own products are exempt, and although such wagons are otherwise taxed as property.[49] But authority in a municipal corporation to regulate and license a business or trade, confers no power to impose a tax upon it;[50] and authority to establish and regulate markets does not empower a city or council to make an ordinance forbidding the peddling of meats.[51] Neither does a power to regulate and license vehicles, used in carrying on any businesss, authorize the adoption of an ordinance, designed for the purpose of raising a revenue by taxation,[52] and power to exact such ordinances as shall be deemed expedient for the good government of the city does not give the right to require a license from peddlers.[53] But if a trade is hurtful, a prohibition against it should be liberally construed. Such a prohibition is a *quasi* judicial act, and can be revised only in the manner provided by the statute making it, and the defendant in a suit for an injunction cannot prove that the trade is not a nuisance.[54]

b Validity of the Exercise of the Delegated Authority.—Ordinances are merely the by-laws of a municipal corporation, and are not exempt from the operation of the general principle that a by-law to be good must be reasonable.[55] Thus an ordinance requiring the payment by hawkers and peddlers of an unreasonable fee, as, "not less than one, nor more than twenty-five dollars for a fixed time in the discretion of the mayor," is void.[56] But an ordinance requiring a person canvassing from house to house for the purpose of selling books to take out a license and pay a certain fee therefor, thus putting him on the same footing with others holding mercantile licenses, is not unreasonable nor opposed to common right.[57] The question of what is considered a reasonable fee is, of course, governed by local considerations and decisions on that point can be of local interest only.[58] An applicant for a hawker's and peddler's

[44] Borough of Warren v. Geer 11 Pa. 415.
[45] Carroll v. Mayor, 12 Ala. 173.
[46] People v. Mulholland, 82 Ky. 324, 37 Am. Rep. 568; Chicago v. Bartel, 100 Ill. 57.
[47] Chicago v. Bartel, 100 Ill. 57.
[48] Com'rs. of Education v. Capeheart, 71 N. C. 156; Davis v. Macon, 64 Ga. 128, 37 Am. Rep. 60.
[49] Davis v. Macon, 64 Ga. 128, 37 Am. Rep. 60. Compare Burr v. Atlanta, 64 Ga. 225.
[50] Muhlenbrinck v. Long Branch Com'rs., 42 N. J. L. 364, 36 Am. Am. Rep. 518.
[51] Burlington v. Dankwardt (Iowa), 34 N. W. Rep. 801.
[52] Brooklyn v. Nodine, 26 Hun (N. Y.), 512.
[53] St. Paul v. Stoltz, Minn. 233.
[54] Taunton v. Taylor, 116 Mass. 254.
[55] State v. Mayor, 37 N. J. L. 348.
[56] State Center v. Barenstein, 66 Iowa, 249.
[57] Borough of Warren v. Geer 11 Pa. 415.
[58] See Cherokee v. Fox, 34 Kan. 16; Coldwater v Russell, 49 Mich. 617.

license, who is refused unless he will pay an excessive and illegal fee imposed by ordinance, is entitled to a *certiorari* to review it,[59] and the question whether or not an ordinance is reasonable is one for the court.[60] So to be valid an ordinance must not discriminate against the products or the residents of one State or locality in favor of those of another;[61] but an ordinance, requiring all peddlers and drummers to pay a license tax will not be considered void as discriminating against the products of other States, because, as a matter of fact, few of the residents of the city or State care to sell under it, so that in practice most of the revenue under it is derived from residents of other States;[62] and in Massachusetts a by-law prohibiting the inhabitants of the city or of any town in the vicinity who offer for sale the produce of their own farms, etc., from occupying any stand for that purpose in certain streets, which are by the by-law a part of the market, was held void.[63] Ordinarily, the only rules and regulations which a corporation may make in respect to business or trade under its police powers are such as have relation to public health and order.[64]

VI. *Effect of Failure to Procure a License.*—While a violation of the laws requiring hawkers and peddlers to pursue their calling under license only will subject the offender to the fine or other penalty prescribed by those laws, it has no effect upon the validity of the contract of sale made by him,[65] and the price of goods thus sold may be recovered by suit equally as well as it could have been done had the sale been made under license.[66] So, where parties in New York forwarded goods to parties in Maine, on an order procured by their unlicensed traveling agent, the fact that the agent in procuring the order was acting in violation of the statutes was no defense to a suit for the price of the goods; for goods thus forwarded upon the order of the purchaser, the seller is entitled to recover.[67]

[59] State v. City of Orange 13 N. J. 240.
[60] State v. Mayor, 37 N. J. L. 348.
[61] See Borough of Warren v. Geer 11 Pa. 415; St. Louis v. Spiegel, 16 Mo. App. 210; Com'rs. of Education v. Capeheart, 71 N. C. 156.
[62] Ex. v. Hansen, 28 Fed. Rep. 127.
[63] Nightingale's Case, 11 Pick. (Mass.) 168; Buffalo v. Webster, 10 Wend. (N. Y.) 99.
[64] Muhlenbrinck v. Long Branch Com'rs., 42 N. J. L. 364, 36 Am. Rep. 518.
[65] See Berry on Sales (ed. 1888), 501.
[66] Jones v. Berry, 33 N. H. 209.

VII. *Prosecution for Violation of License Law.*—Violation of the laws requiring hawkers and peddlers to obtain a license before engaging in their calling, though usually subjecting the offender to a fine or a forfeiture, may in some States be prosecuted by indictment, and it is a general rule that such indictment must set forth the particular acts which constitute the offense.[68] Thus, the allegation that the defendant went from place to place and sold goods is insufficient, for want of a statement that he sold the goods as a hawker and peddler, or while going about as such.[69] The allegation that he had no license is necessary, and a judgment founded upon an indictment not containing such allegation will be reversed;[70] and it must show that he was such a peddler as is required to have a license and that he did sell.[71] In Missouri it is unnecessary to allege to whom the sale was made,[72] but in South Carolina an indictment not containing such allegation was held to be defective.[73] In an Alabama case, however, it was held unnecessary to allege the facts which constitute hawking and peddling, being engaged in the business being considered the gist of the offense.[74] The burden of proof rests with the prosecution, as in other criminal cases.[75] It is no defense to such a prosecution that the accused applied to the proper officer for a license and tendered the fee,[76] and proof of an order of a board of commissioners directing a license to issue, is not equivalent to proof that it was issued; and a license may be authorized and yet not taken out.[77] A warrant issued for the seizure of property which is being peddled, must be directed to and issued against the person actually engaged in the hawking and peddling, whether he be the owner, or merely the agent.[78]

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[67] Burbank v. McDuffee, 65 Me. 135.
[68] Com. v. Dudley, 3 Metc. (Ky.) 221.
[69] Com. v. Bruckheimer, 14 Gray (Mass.), 29.
[70] May v. State, 9 Ala. 167.
[71] Pridgmore v. Thompson, Minor (Ala). 420; Page v. State, 6 Mo. 205; and see Greer v. Bumpass, Mast & Y. (Tenn.) 456; State v. Aiken, 7 Yerg. (Tenn.) 268.
[72] Page v. State, 6 Mo. 205.
[73] State v. Powell, 10 Rich. (S. C.) L. 373.
[74] Sterne v. State, 20 Ala. 43.
[75] State v. Hirsch, 45 Mo. 429; Compare State v. Richeson, 45 Mo. 575.
[76] State v. Meyers, 63 Mo. 321.
[77] Schlict v. State, 31 Ind. 246.
[78] Howard v. Reid, 54 Ga. 328.

SURFACE WATER — DRAINAGE — MUNICIPAL CORPORATIONS.

RYCHLICKE V. CITY OF ST. LOUIS.

Supreme Court of Missouri, June 28, 1889.

A municipal corporation cannot collect surface water into drains, and discharge it thence in a body onto the lands of an adjoining proprietor, over which it formerly flowed, any more than a private person. RAY, C. J., dissenting.

BLACK, J.: When this cause came on for trial in the circuit court, counsel for plaintiff made a statement of the facts which he proposed to prove. The statement was taken as proof of the matters recited, and, thereupon, the court directed a verdict for defendant, and plaintiff took a nonsuit, with leave, etc. This statement, which for the purposes of this appeal must be taken as true, is not as full as might be desired, but it discloses these facts: The plaintiff owns 15 arpens of land in the corporate limits of the city of St. Louis, bounded on the north by Page avenue, and on the east by King's highway. To the north thereof, and separated therefrom by Page avenue, is a block of land; and formerly the surface water on this block, as well as from a large district of country to the north thereof, flowed eastwardly and southwardly, and on and over the plaintiff's land. In opening the streets before named, the defendant diverted the surface water at the north line of the block before mentioned, and caused it to flow east to King's highway, thence south to Page avenue, thence west along the north line of that street for a short distance, and thence by drains and conduits under the road-bed of Page avenue, discharging the same upon plaintiff's property. By reason of the water thus collected and thrown upon plaintiff, six or eight acres of his land were turned into a morass, and ruined for the purpose of cultivation, to which use the land had been before devoted; all to the damage of plaintiff in the sum of $2,000. The work upon the streets was done by virtue of city ordinances duly enacted. The only question is whether these facts constitute a cause of action, and that they do we entertain no doubt. According to the rules of the civil law, as adopted by many if not most of the States of this Union, the owner of the higher adjoining land has a servitude upon the lower land for the discharge of surface water naturally flowing upon the lower land from the dominant estate; but it is well settled by the decisions of the courts, which follow the civil law, that this servitude extends only to surface water arising from natural causes, such as rain and snow, and that the owner of the higher land cannot collect the surface water in drains, trenches, or otherwise, and precipitate it in a body upon the lower land, to the damage of the owner thereof. Crabtree v. Baker, 75 Ala. 92; Ludeling v. Stubbs, 34 La. Ann. 936; Washb. Easm. (3d Ed.) 20, 450. The Supreme Judicial Court of Massachusetts is pronounced in its adherence to the "common-law rule," as it is called on this side of the Atlantic. That court uses this language: "But there is a well-settled distinction that although a man may make any fit use of his own land which he deems best, and will not be responsible for any damages caused by the natural flow of the surface water incident thereto, yet he has not the right to collect the surface water on his own land into a ditch, culvert or other artificial channel, and discharge it upon the lower land to its injury." Rathke v. Gardner, 134 Mass. 14. Other cases in the same court, and in other courts, are to a like effect. White v. Chapin, 12 Allen, 516; Martin v. Simpson, 6 Allen 103; Pettigrew v. Evansville, 25 Wis. 223; Templeton v. Voshloe, 72 Ind. 134. The question presented by this record is whether the defendant may, in the construction of its streets, collect surface water, and then, by means of drains and conduits, discharge it in volume upon the land of an adjoining proprietor. From the authorities before cited it makes no difference whether this particular question is tried by the rules of the civil law, or by what is called the "common-law rule." The result is the same, for either line of decisions rules this question against the defendant. According to our adjudications at this day, the defendant may grade and improve its streets, and is not liable for injuries arising from the incidental interruption or change in the flow of the surface water, save such injuries as may arise from the negligent doing of the work. Jones v. Railroad Co. 84 Mo. 153; Foster v. City of St. Louis, 71 Mo. 157. So, too, the defendant may protect its streets from water that accumulates thereon, and to that end may construct drains, gutters, culverts, and conduits, and may discharge the water into natural drains; but it has no right to discharge the water, thus accumulated, upon adjacent lands, in a body, as was done in this case. The true rule in cases like this was declared in McCormick v. Railroad Co. 57 Mo. 434, where it is said the owner of land cannot collect all the water falling upon his buildings, and, by means of pipes or gutters, precipitate the water upon the land of an adjoining proprietor; nor can he collect the surface water from the surrounding country into a pond, and then turn it loose in large quantities, so as to injure his neighbor. The owner of higher land has no right, by means of artificial ditches, to conduct surface water to, and discharge it upon, the lower land of his neighbor, in increased volume, thereby subjecting the lower estate to an injury it otherwise would not have suffered. Benson v. Railroad Co. 78 Mo. 512. We deem it unnecessary to pursue this question any further. As we understand the law its judgment is, upon the facts before us, that defendant must respond in damages. The judgment is therefore reversed, and the cause remanded.

RAY, C. J., (*dissenting.*) Not being able to concur in the opinion of my associates, in this cause, I present the following statement of the case, together with

my views of the law, and the reasons for my non-concurrence. The petition in this case, after alleging that plaintiff is the owner, and in possession of a tract or parcel of land situated in the city of St. Louis, containing 15 arpens, more or less, and bounded west by the land of Bernard Pratt, south by land of owners unknown, east by the King's highway, and north by Page avenue, proceeds as follows; "Plaintiff further states that defendant illegally, and without color of title or right, under and across Page avenue, had conduits or drains; and by which conduits and drains the surface waters falling north of said Page avenue were collected and thrown upon the said land of plaintiff. Plaintiff further states that the tract so owned and possessed by him, plaintiff, was, at the time of laying said conduits and drains, cultivated land; and by reason of the said surface waters being so thrown upon it, was ruined for the purpose of cultivation,—turned into a morass,—to the great detriment of plaintiff; and by reason of all of which he has sustained damages in the sum of two thousand dollars, and costs, and for which sum he asks judgment." The answer thereto was a general denial. At the trial it was agreed that the following facts should be taken as proved by the plaintiff: "That the plaintiff was at the time of the institution of this suit, and for a long time previous thereto, the owner in fee-simple, and in possession, of the property described in the petition; that the surface water on the land north of the tract, in the petition described, flowed eastwardly and southwardly upon said land of plaintiff; that the defendant, in opening Cook or Page avenue, collected all of the surface waters of a large area north, so that they were diverted along the north edge of the block next north of plaintiff's land, eastwardly to the western line of King's highway, and were then brought southwardly down to the north-west corner of King's highway and Cook or Page avenue, and then turned westward on north line of Cook or Page avenue, and then by drains or conduits laid by the city under the road-bed of Cook or Page avenue, under authority of ordinances for the establishment of said streets, duly enacted, discharged on the land of plaintiff; that throwing said surface water thus collectively on the land of plaintiff has, to the extent of six or eight acres, turned plaintiff's land as described in the petition, into a morass, and ruined it for the purposes of cultivation; and that plaintiff, by the diminished rental caused by these surface waters, has been damaged to the extent of $2,000." Upon this agreed state of facts, the court instructed the jury that the plaintiff was not entitled to recover. Plaintiff, thereupon, took a nonsuit, with leave to move to set the same aside, and his motion in that behalf being overruled appealed the cause to the St. Louis court of appeals, and the same has been duly transferred to this court. From the above statement it appears that plaintiff seeks to recover damages for injuries done to his land by "surface water" collected and thrown upon it by the operations of the city government in opening and constructing Page avenue under authority of ordinances duly enacted for that purpose. It may be well to premise that there seems to be a manifest inconsistency and contradiction in the case made by the pleadings and that presented by the "agreed facts" upon which the case appears to have been submitted at the trial. The first charges that the acts complained of were done illegally, and without color of title or right, and that the "surface waters" were collected and thrown upon plaintiff's land by the conduits or drains laid under and across Page avenue. The second, that said acts were done under the authority of ordinances duly enacted for the establishment of said streets or avenues, and that surface waters were collected and diverted along the north edge of the block next north of plaintiff's land, eastwardly to western line of King's highway, and then brought down southwardly to north-western corner of King's highway and Page avenee, and then turned westward on north line of Page avenue, and then, by drains and conduits, discharged on plaintiff's land. The record shows that the jury were instructed that, "upon the state of facts," plaintiff was not entitled to recover. Without more, it may be somewhat difficult, if not impossible, to tell which state of facts was meant by the court,—that alleged in the petition, or that made by the "agreed facts." In that view of the case, how are we to tell whether the court erred or not, unless we are informed what it has decided? By statute the court is forbidden to reverse a judgment, unless it believes that error was committed against appellant, materially effecting the merits of the action. Section 3775, Rev. St. 1879, p. 642. For these reasons the court perhaps might well affirm the judgment. Randle v. Railroad Co. 65 Mo. at page 332, and cases cited. But, waiving that question, let us proceed to the consideration of the whole case. In the first place, as before stated, I may remark that it appears, from the foregoing statement, that plaintiff seeks to recover damages for injury done to his land by "surface water" collected and thrown upon it by the operations of the city government in opening and constructing Page avenue under authority of ordinances duly enacted for that purpose. It will be noticed that it is not alleged or claimed that there was any negligence or want of care in executing the work in question, nor is it pretended that the city authorities, in constructing said conduits or drains, went beyond the limits of said avenue. I may further add that the brief summary of facts agreed to be taken as proved, and upon which the cause was submitted for trial, fails to show the length of Page avenue bounding plaintiff's land on the north, or how many "conduits or drains" were laid under and across Page avenue. It speaks of them in the plural, but whether there are two, ten, or more does not appear; neither does it show the surface or inclination of plaintiff's land, except that it is lower than the land north of it, and that it contains 15 arpens, more or less; nor does it show whether there were upon it, and, if so, on what part of it, any natural water-courses, ravines, or gullies calculated to drain its surface waters flowing or thrown thereon; or that there were, or were not, any neighboring water-courses, gullies, or ravines near or contiguous to Page avenue, or upon plaintiff's said 15 arpens of land, into which the superabundant surface waters could or might have been conducted and carried off without unnecessary injury to plaintiff or neighboring proprietors. The record before us, in these particulars, and perhaps others, is faulty, and, I think, too defective for such intelligent comprehension of the surroundings as is desirable in considering and passing upon the difficult and vexed questions involved in cases of this sort. It is to be observed, also, that no complaint or question is made or arises in this case as to changing, lowering, or elevating the grade of said Page avenue. Plaintiff's counsel, in his brief in this court, disclaims anything of this sort, and, as I understand him, rests his case solely upon the alleged wrongful laying and constructing said "conduits and drains" across and under said Page avenue, as charged in the petition, which he alleges is no part of said avenue, or necessary to it, but laid, as he alleges in his brief, to relieve the northern owner, at the expense of plaintiff. This thought runs through and seems to be

the burden of, his entire brief. Indeed, it is proper here to add, in the outset, that this suit was brought and tried in the lower court, as we understand, upon the theory of the law as then understood and held in the case of McCormick v. Railroad Co. 70 Mo. 359, and that of Shane v. Railroad Co. 71 Mo. 237, and without any mention or reference to § 21, art. 2, of the constitution of 1875, or the adjudications thereunder; and what is here said, therefore, is not intended to affect, or be construed to affect, that section, or any proper case, affecting the flow and diversion of surface water, made and tried thereunder, and with reference thereto. I deem it sufficient, at present, to consider and dispose of the case actually made and tried in the court below, as shown by the record. It may also be proper to further add that the McCormick and Shane Cases in 70 and 71 Mo., above referred to, were both decided at the October term, 1879, and that this suit was thereafter brought in September, 1880, tried in September, 1884, and the briefs herein were filed in March, 1887; also, that all the adjudications touching § 21, art. 2, of the constitution of 1875, above referred to, as I understand, were rendered subsequent to the institution and trial of this cause in the court below. It thus appears that the only question now before us, upon the meager facts thus presented, is the law governing the flow and change of "surface water," as held and recognized in this State, when applied, as in the case at bar, to the acts of "municipal corporations," done under authority of ordinances duly enacted for the establishment and construction of the street or avenue in question. This question has frequently been before this court, and has received a uniform answer, except as hereinafter noticed. One of the earlier, and perhaps the leading and best considered, case, is that of City of St. Louis v. Gurno, 12 Mo. side p. 415, top p. 268. In disposing of this case, Napton, J., at top page 271, speaking for the court, uses this language: "The only question presented by this record is whether the city of St. Louis is liable to an action for damages consequential upon the grading and paving of a street, directed by the city authorities in pursuance of an ordinance authorized by the city charter. The declaration in this case charged that the work was done so negligently that the water, which, before the improvement of the street, passed off by a natural channel, was thrown upon the plaintiff's premises, and overflowed his cellar, and otherwise greatly impaired the value of his building; but, upon the trial, the court instructed the jury that the corporation was liable for the injury complained of, whether the grading of the street, and the culvert constructed to carry off the water, were properly made or not. So that the naked question is presented, whether the corporation is answerable in a civil action for consequental injuries of this character, however skillfully her agents may have executed the powers intrusted to them." Continuing on top of page 272, this further language is used: "Our impression is that such actions as the present cannot be maintained. The distinction taken by the counsel, in the argument of this case, between the acts of municipal corporations, in the discharge of such legislative functions as have been delegated to them by the State, and those acts which are done by mere private corporations, or by municipal corporations in the prosecution of a mere private enterprise, we take to be a sound one. Where a municipal corporation engages in an undertaking having no reference to her municipal duties, or the interests of the public at large, but merely for her private emolument or convenience, she is then upon the same foot with any individual or private corporation, and is unquestionably answerable for her acts precisely to the same extent that an individual would be. This distinction has been recognized by the adjudged cases to which we shall hereafter advert. At the present we shall only observe that the act complained of in this case was clearly one of those done in pursuance of a power vested by the charter in the city of St. Louis, for public purposes," citing among others, Wilson v. Mayor, etc. 1 Denio, 597; Green v. Borough of Reading, 9 Watts, 382; also, Mayor v. Randolph, 4 Watts & S. 516; Callender v. Marsh, 1 Pick. 418. Continuing on top page 275, this further language is used: "That such a distinction had been taken in all the English cases seems to be conceded. * * * The decisions in New York, Pennsylvania, and Massachusetts, we have seen, are in conformity to this principle; and the Supreme Court of the United States, in Goszler v. Corporation of Georgetown, 6 Wheat. 593, indirectly sanctions the same principle. * * * Sutton v. Clarke, 6 Taunt. 42, and Harman v. Tappenden, 1 East, 555."

The principles settled in City of St. Louis v. Gurno, *supra*, are approved in the following subsequent cases: Taylor v. City of St. Louis, 14 Mo. 19, at page 22; Lambar v, City of St. Louis, 15 Mo. 610; Hoffman v. City of St. Louis, *Id.* 651; and Imler v. City of Springfield, 55 Mo. 119. Jones v. Hannovan, *Id.* 462, recognizes the same rule as to the flow of surface water. In Foster v. City of St. Louis, 71 Mo. 157, it is expressly held (see head-note) that "a city is liable in damages for flooding of private property, caused by the construction of a street, in pursuance of a plan prescribed by ordinance, only when the injury is the result of negligent execution of the plan, not when it is a result of a defect in the plan itself." Ang. on Water-courses, (7th Ed.) § 108*l*, p. 135, treating of same subject, uses this language: "Town officers in repairing a highway, may construct drains and culverts within the limits of a highway; and if the surface water, after flowing in them for some distance, turns upon the land of an adjoining proprietor, no action at law lies for the damage thereby occasioned. Towns are bound to make their highways safe and convenient for travelers; and they and their officers are protected in doing it, so long as they act within the scope of their authority, and execute the work in a reasonably proper and skillful manner, although their operations cause the surface water to flow upon the adjacent proprietors in large quantities, to their injury. Their rights are commensurate with their duties. * * * One of these rights is that of keeping the traveled path free from surface water, in such manner as the officers of the town think proper. The same author in § 108*m*, p. 136, uses this further language: "So, on the other hand, the owner of land which adjoins a highway, may lawfully do any acts upon his own land to prevent surface water from coming thereon from the highway, and may stop up the mouth of a culvert built by the selectmen across the highway for the purpose of conducting such surface water upon his land, providing he can do so without going beyond the limits of his own land." So, in McCormick v. Railroad Co. 57 Mo., on pages 437 and 438, this court, Vories, J., speaking for the court, uses this language: "There is no doubt but that the authorities of towns and cities, whose duty it is to keep the streets and public ways in good repair for the use of the public, may repair the same in a reasonable manner, without incurring any liability to adjoining proprietors, even though said improvements may cause a change in the natural flow of surface water to their injury. * * * The general rule, however, is that either municipal corporations

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or private persons may so occupy and improve their land, and use it for such purposes as they may see fit, either by grading or filling up low places, or erecting buildings thereon, or by making any other improvements thereon, to make it fit for cultivation or other profitable or desirable enjoyment; and it makes no difference that the effect of such improvement is to change the flow of the surface water, accumulating or falling on the surrounding country, so as to either increase or diminish the quantity of such water, which had previously flowed upon the land of the adjoining proprietors, to their inconvenience or injury. Ang. Water-courses, p. 122, § 108*b*, and following, and cases there cited; Goodale v. Tuttle, 29 N. Y. 459; Waffle v. Railroad Co. 58 Barb. 413; Turner v. Inhabitants, 13 Allen, 291; Imler v. City of Springfield, 55 Mo. 119, and cases there cited. * * * He must improve and use his own lands in a reasonable way; and, in so doing, he may turn the course of, and protect his own land from, the surface water flowing thereon; and he will not be liable for any incidental injury occasioned to others by the changed course in which the water may naturally flow, and for its increase upon the land of others. Each proprietor, in such case, is left to protect his own lands against the common enemy of all." It is proper here to add that this case uses other language, of which I shall speak hereafter, that has been thought and construed to assert a contrary doctrine; but, of this, further on. Numerous other authorities recognize and assert the same general doctrine; See Clark v. Railroad Co. 36 Mo. 202, 224; Hosher v. Railroad Co. 60 Mo. 329; Munkers v. Railroad Co. *Id.* 334; Abbott v. Railroad Co. 83 Mo. 271, 280; Hoester v. Hemsath, 16 Mo. App. 485. In the case of Gannon v. Hargadon, 10 Allen, 106, 109, 110, Chief Justice Bigelow, speaking for the court, uses this language: "The right of an owner of land to occupy and improve it in such manner, and for such purposes, as he may see fit, either by changing the surface, or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated, with reference to that of adjoining owners, that an alteration in the mode of its improvement or occupation, in any portion of it, will cause water which may accumulate thereon by rains and snows falling on its surface, or flowing onto it over the surface of adjacent lots, either to stand in unusual quantities on other adjacent lands, or pass into and over the same, in greater quantities, or in other directions, than they were accustomed to flow. * * * A party may improve any portion of his land, although he may thereby cause the surface water flowing thereon, whensoever it may come, to pass over in a different direction, and in larger quantities than previously. If such an act causes damages to an adjacent land, it is *damnum absque injuria*." See, also, Ang. Water-courses, § 108*a*, and on pages 119, 120. In Benson v. Railroad Co. 78 Mo. 512, the court speaking through Phillips, C., uses this language: "The general rule, it is true, applicable to the enjoyment of real estate, is expressed in the maxim, '*Cujus est solum, ejus est usque ad cœlum.*'" He has ordinarily the right to use and improve his real estate by protecting it against water flowing over its surface. In doing so, the dominant proprietor may turn it from his land onto the servient or lower land, without liability to damages. Ang. Water-courses, p. 120. Mere surface water—that which does not run in any definite course or confined channel—is regarded as a common enemy, against which any land-owner affected by it may fight. Hoyt v. City of Hudson, 27 Wis. 656; Hosher v. Railroad Co. 60 Mo. 333. But, in doing so, regard must be had to another recognized maxim of law, "*Sic utere tuo ut alienum non lædas.*" To the same effect is the language of Denio, C. J., in the case of Goodale v. Tuttle, 29 N. Y. 459, where he said: "And, in respect to the running off of surface water caused by rain or snow, I know of no principle which will prevent the owner of land from filling up the wet and marshy places on his own soil, for its amelioration and his own advantage, because his neighbor's land is so situated as to be incommoded by it. Such a doctrine would militate against the well-settled rule that the owner of land has full dominion over the whole space above and below the surface." See, also, Ang. Water-courses, § 108c, on page 123. In the case of Stewart v. City of Clinton, 79 Mo. 612, the court uses this language: "Surface water, the books say, is a common enemy against which any land proprietor has a right to fight; * * * but as to mere surface water running down a street, as in this case, in no confined channel, the dominant proprietor may divert it, and turn it upon the servient land without liability. * * * This injury he could easily have prevented by closing up his pipes, * * * for, if the plaintiff could have prevented the injury, 'at a trifling expense and by reasonable exertion,' his complaint is clearly *damnun absque injuria*, no matter who was originally in fault." In the case of Hoyt v. City of Hudson, 27 Wis. 656, the general doctrine of the "common law" in reference to "surface water" is clearly stated and approved. To the same effect, also, is the opinion of the St. Louis court of appeals in the case of Hoester v. Hemsath, 16 Mo. App. 485, 486, where the doctrine of the common law as to surface water is clearly and forcibly stated and approved.

The adjudications and authorities hereinbefore cited are, I think, sufficient to show what the common-law rule is in reference to "surface water," its flow and diversion, as well as how it has been applied, recognized and approved, both in this State as well as others, where the same rule prevails. As is well known, there is another rule applicable to this subject, known as the "civil law rule," which prevails in many of the States. These two rules, as is well known, are largely antagonistic to each other, and have occasioned not only much conflict, and some confusion in the rulings of the several States, but also occasioned vacillation in the rulings of the same State. The difference between these two rules is well expressed in the case of Hoyt v. City of Hudson, 27 Wis. 659, where it is thus stated: "The doctrine of the 'civil law' is that the owner of the upper or dominant estate has a natural easement or servitute in the lower or servient one, to discharge all waters falling or accumulating upon his land, which is higher, upon or over the land of the servient owner, as in a state of nature, and that such natural flow or passage of the water cannot be interrupted or prevented by the servient owner to the detriment or injury of the estate of the dominant or any other proprietor." This rule prevails in Pennsylvania, Iowa, Illinois, Ohio, and perhaps other States. "The doctrine of the 'common law' is that there exists no such natural easement or servitude in favor of the owner of the superior or higher ground or fields as to mere 'surface water,' or such as falls or accumulates by rain or the melting of snow; and that the proprietor of the inferior or lower tenement or estate may, if he choose, lawfully obstruct or hinder the natural flow of such water thereon, and in so doing may turn the same back upon, or off, onto or over the lands of other proprietors without liability for injuries ensuing from such obstruction or diversion. This is the rule n England, and in Massachusetts, New York, Con-

necticut, Vermont, New Jersey, New Hampshire, Wisconsin, and perhaps others." *Id.* It may be said that the views here last expressed, and herein approved, are not in exact harmony with those of Dill. Mun. Corp. §§ 1042, 1051; but it must be remembered that Judge Dillon, in his able work on Municipal Corporations, in said sections but expresses the views held and recognized in the State of Iowa and other States, adopting the rule of the "civil law" on this question. Judge Dillon himself, as I understand, while on the bench of the State of Iowa, in the case of Livingston v. McDonald, 21 Iowa, 160, 164, 168, and following, entertained and expressed the same views embodied in sections 1042, 1051, *supra*, of his work on Municipal Corporations. So, of Washburn on Easements and Servitudes, § 6, p. 353, and other writers holding the same views. I understand the theory of plaintiff's petition and his argument in this court to be "that the laying of said conduits or drains under and across Page avenue, is *per se* actionable, regardless of negligence or want of care, in their construction." So it would be, if tried or governed by the rule of the "civil law." But, as was said in Abbott v. Railroad Co., 83 Mo. 285, "the statute of this State (§ 3117, p. 521) declares that 'the common law of England * * * shall be the rule of action and decision in this State, any law, custom, or usage to the contrary notwithstanding.'" The plaintiff, in drawing his petition, (I apprehend,) failed to distinguish the difference between the civil and common law, as above indicated on this question. In his brief, he cites and relies on the case of McCormick v. Railroad Co., 70 Mo. 359. That case is the same one reported in 57 Mo. 433, hereinbefore referred to. The "other language" there referred to as having been thought and construed to assert a doctrine contrary to that, copied in this opinion, is found on page 438, and is as follows: "The owner of land could not collect all of the water falling upon his buildings during heavy rains, and by means of pipes or gutters precipitate the water thus collected upon the land of the adjoining proprietor; *nor could he collect the surface water from the surrounding country into a large reservoir or pond upon the line dividing his land and the land of an adjoining proprietor, and then turn it loose in large quantities on the land of the adjoining proprietor, so as to destroy the value of the land and crops of the adjoining proprietor.*" In that portion of the above paragraph which I have here italicized and put in quotation marks, there may be, perhaps, an inadvertent and misleading blending of the rule of the civil law with that of the common law, touching the flow of surface water. That part of the paragraph thus italicized, as I understand it, is, I think, misleading, and liable to the construction that the acts there specified are actionable *per se;* and the party doing them is liable in damages, regardless of the question of negligence, or want of due care. That unquestionably is the rule of the civil law." But the "common law," by statute as well as by a long line of adjudication in this State, as we have seen, is declared to "be the rule of action and decision in this State, any law, custom, or usage to the contrary notwithstanding." Whether in so doing, the company, in the McCormick Case, 57 Mo. *supra*, was liable in damages under the common-law rule, I venture to say (as was held and declared in Abbott v. Railroad Co., 83 Mo. 280, 281) depends upon whether the company in so doing (having competent authority so to do) exercised reasonable care and skill with reference to the safety and security of its road-bed and track, and to the traveling public, and at the same time that it was equally bound to see that no unnecessary injury was done to the adjoining proprietors by the obstruction and deflection of surface water incident to such careful and skillful construction of the same. This duty rests with equal force upon the defendant in both respects; and whether there has been a failure to discharge that duty in a given case in any material particular, either by failure to provide sufficient water-way (or, in the McCormick Case, for the construction of improper water-ways or channels) when necessary and proper, or by failure to exercise reasonable care and skill in any other particular, is a question of fact to be determined by the jury, under proper instructions from the court, with reference to the particular facts in the case. If that be so, the acts specified in the passage from the McCormick opinion, 57 Mo. 438, hereinbefore quoted and italicized, would not, as there held, be actionable *per se*, regardless of care and skill or the want thereof in so doing.

So in the case at bar, the city, having authority to construct said conduits or drains, was, in my opinion, bound by a like duty, subject to like obligations, and exempt from like responsibility, for like injuries and damages as specified in the opinion in Abbott v. Railroad Co., at pages 280, 281; and it follows, in my opinion, that the acts charged in the case at bar are not *per se* actionable, and that the court was right in so ruling. But the doctrine from the McCormick Case, 57 Mo. 438, thus italicized, whether right or wrong in principle, or whether of civil or common law origin, is in any event outside of the case made by the pleadings, evidence, and instructions in that cause, (*Id.*,) as will be seen on examination of that case, and as hereafter shown, and therefore mere *obiter dictum*, and consequently without any binding force as authority. To show that the above paragraph so italicized is not only misleading, but in fact a part of the "civil law," and borrowed therefrom, it is only necessary to refer to the opinion in 70 Mo., *supra*, where the same case was here a second time for review, and where the learned judge undertook to construe, and did construe, what had been said and decided when the case was first here in 57 Mo., *supra*. In the outset of the opinion in 70 Mo., *supra*, the court uses this language: "When this case was here in 1874 (57 Mo. 433) the court clearly indicated the ground upon which the plaintiff's right of recovery must be based. The opinion in the case adopted the views of Lowrie, J., in Kauffman v. Griesemer, 26 Pa. St. 415." The opinion then sets out at considerable length the views and language of Judge Lowrie, which, on examination, are found to embody and approve the civil-law doctrine, and which the learned judge declares were in truth drawn from the Roman law, and were the bases of the decision of this court when the case was here before. If that were so, the reversal of the 70 Mo., *supra*, would to that extent operate as a reversal of the ground upon which that recovery was justified and upheld. The plaintiff, in his brief, cites and relies on the case of McCormick v. Railroad Co., 70 Mo. 359, which is expressly overruled by the case of Abbott v. Same, *supra*. Indeed, the Case of McCormick, in 70 Mo., *supra*, is the same case reported in 57 Mo. 433. When first here, in 57 Mo., *supra*, it will be found, when carefully examined, to be about this: The plaintiff, in his petition, claims that the defendant had so constructed its road-bed that the embankments made therefor had collected a large body of surface and overflowed water on the east side of its road-bed, where the same adjoined the land of plaintiff; and that, after said water had been so collected in a large body or pond, then defendant negligently and maliciously cut an artificial channel from said body o

water through the embankment of said road-bed, and drained all of said large body of water onto plaintiff's land, by which plaintiff was injured, etc. The bill of exceptions does not set out the evidence, but simply states that plaintiff introduced evidence tending to prove the material allegations in the petition, and that the defendant offered evidence tending to prove the allegations set up in the second defense to the petition. The second defense here alluded to (after mentioning the condemnation of the right of way for the road-bed, and the payment of the damage assessed therefor) proceeds to state "that the damages so assessed and paid included whatever damages could or might be done to plaintiff's land by the building and construction of said railroad, and all embankments thereon, and all drains and channels under said embankment, necessary to the proper construction and maintenance of said railroad, and that the channel mentioned in said petition was necessary to the use and maintenance of said road." This evidence offered by the defendant was objected to by plaintiff, as being immaterial and going to prove no defense to plaintiff's action. This objection was overruled, and plaintiff excepted. The plaintiff, at the close of the evidence asked the court to give (among others) the following instructions: "The court instructs the jury that if they believe from the evidence that defendant collected a large body of 'surplus water' on the east side of its railroad, by the embankment of said road as charged in plaintiff's petition, and that some time in June of 1871, or about that time charged in plaintiff's petition, said defendant by an artificial channel through said embankment, negligently and carelessly drained said body of water onto plaintiff's land, then plaintiff is entitled to recover what damages he has suffered, as shown by the evidence," all of which the court refused, and plaintiff accepted. The plaintiff then suffers a nonsuit, with leave to move to set the same aside, which was afterwards overruled by the court, and plaintiff again excepted, and brought the case to the supreme court by writ of error. Upon this state of the case the court held that "the only question presented for the consideration of this court by the record in this case grew out of the action of the circuit court in giving and refusing instructions asked by the respective parties; for, if the instructions given on the part of defendant were properly given, the evidence objected to by the plaintiff was properly received." The instructions given for defendant I have not deemed it necessary here to set out, as the case was made to turn upon the refusal of plaintiff's said instructions, above set out. The court then remarked that "the first instruction asked by the plaintiff told the jury, in effect, that if the plaintiff did this act charged in the petition in the manner therein charged, plaintiff had a right to recover. The court then adds: "We think this instruction ought to have been given;" and its refusal was held to be error, for which the judgment was reversed, and the cause remanded for a new trial, etc.

In the passages last above quoted from 57 Mo. 438, there is, I think, an unfortunate blending of the civil and common-law rules pertaining to the subject, that has led to some misapprehension as to what the learned judge delivering that opinion really meant thereby. The learned judge, who decided the case when it came the second time for review, in 70 Mo., *supra*, thus interprets its meaning and origin, by the use of the following language: "When this case was here in 1874 (57 Mo. 433) the court clearly indicated the ground upon which the plaintiff's right of recovery must be based. The opinion in the case adopted the views of Lowrie, J., in Kauffman v. Griesemer, 26 Pa. St. 415" (which are then set out at considerable length), and which, when examined, are found to be the "civil-law rules" on that subject, and so declared by the learned judge in his opinion, when the case was here in, 70 Mo., *supra*. If that was a correct interpretation of the first opinion in 57 Mo., *supra*, in which we do not concur except as herein stated, then it was overruled by case of Abbott v. Railroad Co., in 83 Mo., *supra*. But we are of opinion that the case in 57 Mo., *supra*, was not designed to adopt or support the "civil-law rule" as to the "flow of surface water," while one passage only therein, if taken by itself, is, I think, liable to that construction, and has led to some misunderstanding as to what was really meant. That passage, here referred to, is this: "Nor could he (the owner of the land) collect the surface water from the surrounding country into a large reservoir or pond upon the line dividing his land and the land of an adjoining proprietor, * * * so as to distroy the value of the land and crops of the adjoining proprietor." This passage is, I think, borrowed from the civil law, and inadvertently, perhaps, deemed a part of the law. To this extent only, in my opinion, is the interpretation placed upon it by 70 Mo., *supra*, correct. All the balance of what is stated on the subject in 57 Mo., *supra*, is clearly common law, and not civil law. The passage above quoted from 57 Mo. 438, as I understand it, declares that the acts there charged are actionable *per se*, regardless of negligence or the want of ordinary care. If tried by the rule of the civil law, that is true; but, if tried by the rule of the common law, its actionability, in my opinion, depends upon whether, under all the circumstances, the party thus collecting and discharging the waters in question in so doing had due regard to the safety and security of the road-bed, and the right of adjoining proprietors, as to inflict no unnecessary injury thereby. The rule being, as I understand, that where the party is authorized by law to do the act in question, he is only liable for the want of due care in the execution of the work, and if in so doing he occasions no unnecessary injury to adjoining proprietors he is not responsible in damage, therefor. This is the rule distinctly announced and approved in the case of Abbott v. Railroad Co., *supra*, 280, 281, and authorities there cited. And, as I understand, this is the purport of the common-law rule, as found and approved in the numerous adjudications and authorities hereinbefore cited. The party authorized to do the work must do so in a careful manner, and inflict no unnecessary injury to others. So, in laying the conduits and drains under and across Page avenue, complained of in case at bar, it is, I think, impossible to declare, as matter of law, that the city was liable in damages without a due consideration of all the facts and circumstances necessary to be shown and considered with reference thereto, none of which, in my opinion, are sufficiently stated and charged in the petition. I am therefore of opinion that the trial court committed no error in instructing the jury that the plaintiff was not entitled to recover.

In conclusion I may add that I greatly fear, if I correctly understand the scope and bearing of the majority opinion, that it will go far to shake all confidence in, if not absolutely unsettle, an important question of great public interest that had been supposed to have been permanently set at rest in this State by the late adjudications of our courts. Hoester v. Hemsath, 16 Mo. App. 486, and case cited; Abbott v. Railroad Co., 83 Mo. 271, 280, 281, and cases cited. If I mistake not, it will greatly cripple and embarrass the enterprise and operations of all municipal and other corporations, as well as that larger interest of agricultu-

ral development everywhere on the increase, and of the greatest interest to the whole country. To illustrate: A railroad embankment is constructed across lowlands, between neighboring elevations, in the country through which the road runs. The necessary consequence is that a body of water, large or small, from rains and melting snows, is collected and blocked up on the higher lands to their injury; to avoid which and preserve their road-bed the company constructs one or more conduits through the embankment for the passage of the waters to the low land on opposite side of the road, to its injury; or to prevent that the company digs a ditch along the side of the road-bed, on the down grade, and carries the waters off in that direction. These waters to collected and diverted must necessarily be discharged on the first low land reached in their progress, to its damage, unless, perchance, a neighboring stream can be found to receive and convey them harmless away. This dilemma is inevitable, and there is no escape from it, if the doctrine contended for by plaintiff and sustained by the majority opinion prevails. To illustrate again: The same impracticable and unsurmountable difficulties must necessarily obstruct and render futile any system of drainage among adjoining proprietors in all agricultural and farming districts in the whole country if the principle underlying the majority opinion prevails. So, too, of all cities, towns, and villages. Such a rule is manifestly impracticable, and cannot surely be the law. The true rule is that of the common law, as herein explained and heretofore unanimously approved in Abbott v. Railroad Co., *supra*, and also in Hoester v. Hemsath, *supra*. We may also further add that the authority of the case of Pettigrew v. Village of Evansville, 25 Wis. 223, cited and relied on by the majority opinion herein, as I understand, has been expressly greatly modified, if not entirely and virtually overruled, by a subsequent opinion of the same court in the case of Hoyt v. City of Hudson, 27 Wis. 656, and following. The latter case repudiates the doctrine of the civil law, and adopts and approves that of the common law.

CONSTITUTIONAL AMENDMENT TO BE SUBMITTED TO THE QUALIFIED VOTERS OF MISSOURI.

Be it resolved by the House of Representatives, the Senate concurring therein:

That at the general election to be held on the Tuesday next following the first Monday in November, A. D. 1890, the following amendment to the constitution of Missouri, concerning the judicial department, shall be submitted to the qualified voters of said State, to wit:

SECTION 1. The supreme court shall consist of seven judges, and, after the first Monday in January, 1891, shall be divided into two divisions, as follows: One division to consist of four judges of the court and to be known as division number one, the other to consist of the remaining judges, and to be known as division number two. The divisions shall sit separately for the hearing and disposition of causes and matters pertaining thereto, and shall have concurrent jurisdictions of all matters and causes in the supreme court, except that division number two shall have exclusive cognizance of all criminal cases pending in said court, provided that a cause therein may be transferred to the court as provided in section 4 of this amendment. The division of business of which said divisions have concurrent jurisdiction shall be made as the supreme court may determine. (A majority of the judges of a division shall constitute a quorum thereof, and all orders, judgments and decrees of either division, as to causes and matters pending before it, shall have the force and effect of those of the court.)

SEC. 2. Upon the adoption of this amendment, the governor shall appoint two additional judges of the supreme court, who shall hold their offices until the first Monday in January, 1893, and at the general election in the year 1892 their successors shall be elected, who shall hold their offices for the term of ten years, as other judges of the supreme court. The two judges appointed by the governor, together with the judge elected at the general election in the year 1890, shall constitute division number two, and the remaining judges shall constitute division number one. The court shall elect its chief justice and each division a presiding judge thereof.

SEC. 3. The supreme court shall assign to each division the causes and matters to be heard by it, of which assignment due public notice shall be given; and all laws relating to practice in the supreme court, as well as the rules of the supreme court, shall apply to each division so far as they may be applicable thereto. The opinion of each division shall be in writing, and shall be filed in the causes in which they shall be respectively made during the term at which the cause is submitted, and such opinions shall be a part of the records of the supreme court. Each division shall have authority to issue the original writs and exercise the powers enumerated in section three of article six of the constitution.

SEC. 4. When the judges of a division are equally divided in opinion in a cause, or where a judge of a division dissents from the opinion therein, or where a federal question is involved, the cause, on the application of the losing party, shall be transferred to the court for its decision; or where a division in which a cause is pending shall so order, the cause shall be transferred to the court for its decision.

SEC. 5. Whenever, in the opinion of the supreme court, the state of its docket with reference to the speedy disposition of the business of the court will justify dispensing with the divisions hereinbefore provided, the court shall dispense therewith, and the court shall thereafter hear and determine all causes pending in it: Provided, however, that the court shall have the power to again divide itself into two divisions, in like manner and with like power and effect as hereinbefore provided, whenever, in the opinion of six judges thereof, entered of record, the condition of its docket with reference to the speedy disposition of the business of the court shall so require, and in such division the four judges oldest in commission shall constitute division number one, and the remaining judges division number two.

SEC. 6. All provisions of the constitution of the State and all laws thereof not consistent with this amendment shall, upon its adoption, be forever rescinded and of no effect.

RECENT PUBLICATIONS.

COMMENTARIES ON AMERICAN LAW. By James Kent, in four Volumes. Volume I. New and Thoroughly Revised Edition By William M. Lace, of the Phil-

adelphia Bar. Philadelphia: The Blackstone Publishing Co. 1889.

The value of this edition of Kent's Commentaries, if value it has outside of the original text, which we are told is without condensation or abbreviation, must be in its notes, as prepared by Mr. Lacy, the editor. The preface informs us that the notes "have, as far as possible, been adapted to the original plan and purposes of the work, to the end, it was hoped, that these might continue to be realized. In the parts which treat of international and constitutional law historical notes seemed to be required, and have been inserted. The first of the chapters to the federal judiciary system was found to be, even in the latest editions, years in arrear of sweeping changes. Here, therefore, the work of annotation consisted chiefly in presenting, sometimes in full and sometimes in substance, acts of congress now in force. Throughout, notes of reference to recent decisions, and notes critical, defining, and explanatory have been added wherever they promised to be of service to the reader. In some instances I have thought it necessary to summarize, systemize, and complete portions of the author's treatment which in teaching I have found to be confusing to the student. By many cross references from one part to another, I have sought to provide against the inconvenience that attends partial discussions of a subject widely separated from each other. In no case have I altered or omitted any portion of the text; though in some cases I have (between brackets [ ]) inserted therein matter intended to contribute to its intelligibility or accuracy." A cursory examination leads us to believe that in most respects the editor has been diligent and accurate in the preparation of the notes. The cheapness of this series of volumes will commend them to the profession, although the binding in leatherette will be found very unsatisfactory.

JETSAM AND FLOTSAM.

DIVORCE WITHOUT PUBLICITY.— Judge McAdam, of New York, makes the following suggestions in reference to divorces, which substantially meet with our approval: "Apart from a constitutional amendment authorizing a national law making marriage and divorce uniform throughout the States (a measure I favor), I know of no better plan of reforming abuses in existing laws than to hear all applications for divorce in open court. In this way the judge is brought face to face with the attorneys, the parties and their witnesses, and everything is done in the light of day. Fraud is made successful only by concealment. The divorce lawyer advertises that he will procure 'divorces without publicity,' and the present practice of the courts makes this possible. This leads to the numerous frauds that make the divorce lawyer successful. The evidence taken in the referee's private office is, with the decree, carefully sealed by the court, and fraud is closed to every avenue leading to discovery. These vicious rules must be abandoned, and this 'star chamber' mode of procedure must cease. There is no intelligent reason for its continuance. The law should be amended by requiring every decree of divorce to be recorded in the office of the secretary of State at Albany before it becomes effective. This is important in view of the fact that a divorce may be granted by the courts in any of the sixty counties of the State, and it is at present a difficult and expensive task to ascertain whether a person has been divorced or not. The marriage relation is too sacred and important to be dissolved without publicity. Every marriage must be recorded in the county where it is performed, and the record is open at all times to public inspection, but after the parties have entered upon the marital relation all traces of its subsequent dissolution are sealed and effectually hidden by the rules of court under the guise of morality. The practice is contrary to public policy, and is not warranted by any rule of morals."—*Albany Law Journal.*

HUMORS OF THE LAW.

Penitentiary Visitor—"My poor man, how did you come to be in here?"

Prisoner—"For selling fraudulent goods and thereby getting money under false pretenses."

Visitor—"I hope you'll become an honest man here, and be a good citizen when you are released. What are you employed at by the State!"

Prisoner—"Making warranted solid leather soles for boots and shoes out of pasteboard."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ADMIRALTY—Jurisdiction.—Libelant is an American citizen, who sues as assignee of the owners of the British ship A, and the action is brought to recover damages caused by a collision in the English channel between the A and the German steamer B. The steamer has never been in the United States, none of her witnesses are here, and the owner asks the court, on the above facts, to decline to entertain jurisdiction of the action. The owner of the German steamer has been requested, and refused, to appear in an action instituted against him in a British court: *Held*, assuming, but not deciding, that it is competent for a court of admiralty, in its discretion, to decline to entertain jurisdiction of a cause of collision on the high seas where all the parties are foreigners, this case presents no grounds on which the court should so decline jurisdiction.—*Chubb v. Hamburg American Packet Co.*, (U. S. D. C.) N. Y., 39 Fed. Rep. 431.

2. ADMIRALTY — Passenger Act. — In a proceeding against a vessel, under the passenger act of 1882, to recover a penalty for carrying an excess of passengers, it is not necessary, in order to create a liability on the part of the vessel, to allege and prove that in a criminal proceeding instituted under the statute the master has been convicted, and a fine imposed upon him equal to the sum claimed against the vessel. — *The Scotia*, (U. S. D. C.) N. Y., 39 Fed. Rep. 429.

3. ADMIRALTY—Shipping.—Libelant, while in the pilot-house of a tug lying along-side a steamer, was injured in the ear by the concussion of a cannon, fired aboard

the steam ship to indicate her departure for sea: *Held*, that the steam-ship was liable for such injury. For negligence in ship's work, the ship herself is liable. — *The Barracouta*, (U. S. D. C.) N. Y., 39 Fed. Rep. 428.

4. APPLICATION OF PAYMENTS. — Where a judgment debtor voluntarily pays money to the sheriff with an order to credit it on the execution, and a proceeding is instituted by another judgment creditor to have the money applied on his judgment, the debtor cannot, as against the first creditor, claim the money on the ground that is is the proceeds of the cotton raised on his homestead, as title to the money passed by delivery to the sheriff, who was the collecting agent of the creditor to whose judgment it was ordered to be applied.—*Cloud v. Kendrick*, Ga., 9 S. E. Rep. 1084.

5. ARBITRATION AND AWARD. — No action at common law can be maintained on an award of arbitrators rendered under a statutory submission which does not comply with the statute.—*Erie Telegraph, etc. Co. v. Bent*, (U. S. C. C.) Mass., 39 Fed. Rep. 409.

6. ATTACHMENT—Evidence. — As tending to show that plaintiff had no reasonable cause for attachment, on the ground that defendants were about to dispose of their property with intent to defraud creditors, testimony was admissible that before the attachment defendants consulted plaintiff, and asked for his approval in the matter of a contemplated change in the partnership, this being the only intended disposition on which plaintiff relied for his attachments. — *McClelland v. Fallon*, Tex., 12 S. W. Rep. 60.

7. BONA FIDE PURCHASER. — In an action of trespass to try title, plaintiff claimed through mesne conveyances under a lost deed alleged to have been executed by the patentee of the land in question in 1856. His title papers were not recorded until December 8, 1884. Defendant, who purchased the land in May 30, 1884, claimed title under a deed from the widow and children of the patentee, reciting that the grantee was "to have and to hold the premises in dispute unto their grantee, his heirs and assigns, forever," and had no actual notice of plaintiff's unrecorded deed: *Held*, that the intent of the deed being to convey the premises and not the grantor's interest therein, it was not a mere quitclaim, and defendant was a *bona fide* purchaser without notice, actual or constructive. — *Garrett v. Christopher*, Tex., 12 S. W. Rep. 67.

8. CARRIERS—Baggage.—A common carrier which, by its agent, receives and checks as personal baggage a trunk containing jewelry, the agent knowing or having reason to believe that the trunk contains jewelry, and not wearing apparel, is liable for loss of the property to the same extent as if the trunk contained nothing but wearing apparel. — *Central Trust Co. v. Wabash, etc. Ry. Co.*, (U. S. C. C.) Ill., 39 Fed. Rep. 417.

9. CLERK OF COURT— Fees. — The clerk of the United States district court is entitled to fees from the government for filing separately, in criminal cases, the process or copy of process, the bail-bond, and the recognizance of witnesses sent up by the commissioner. — *Jones v. United States*, (U. S. D. C.) Ala., 39 Fed. Rep. 410.

10. CONSTITUTIONAL LAW— Appropriations. — Act Cal. March 14, 1889, appropriating the sum of $100,000 "for the support and maintenance of the mining bureau," is sufficiently specific, within the meaning of the constitution and statutes of the State, and is not void because it fails to designate on what fund the warrant is to be drawn, and does not state that the money "is appropriated out of the moneys in the treasury not otherwise appropriated." — *Prolt v. Dunn*, Cal., 22 Pac. Rep. 143.

11. CONSTITUTIONAL LAW. — Respondent refused to issue his warrant, as comptroller of State, for certain money, on the ground that the bill making the appropriation had not been read on three several days in either the senate or assembly, as required by the constitution: *Held*, that it is not necessary that the legislative journals show affirmatively that a bill and its amendments were read as required by the constitution; and in the absence of a record, not required by the constitution to be kept, it will be presumed that in the passage of a bill the legislature complied with all constitutional requirements. — *People v. Dunn, Comptroller*, Cal., 22 Pac. Rep. 140.

12. CONTEMPT — Libel of Presiding Judge. — The furnishing by a correspondent for publication, and procuring to be published in a newspaper, an article containing statements regarding a judge then engaged in the trial of a cause, imputing to him conduct in respect to the case upon trial which, if true, would render him an unfit person to preside at the trial of the cause, with knowledge on the part of the correspondent that such newspaper has a large circulation in the county where the trial is in progress, and with reasonable ground to believe that the same will, when published, be circulated in the court room and about the courthouse during said trial, and there read, and which was afterwards, during the trial, circulated and read therein, is a contempt of court. — *Myers v. State*, Ohio, 22 N. E. Rep. 43.

13. CONTRACT—Exchange of Lands.—A contract for an exchange of real estate provided that plaintiff should give a good title to the estate to be conveyed free from any incumbrance, except a specified mortgage. The deed under which plaintiff held ran to him as trustee for his four minor children, in the ordinary form of a quitclaim deed, no trust or powers being expressed and no words of inheritance with reference to the children being used therein: *Held*, that such deed vested the legal estate only in plaintiff, who could neither sell nor convey the title stipulated for in the contract, since the children had the equitable estate at least for life.— *Fish v. Prior*, R. I., 18 Atl. Rep. 162.

14. CONTRACT. — Where a building contract provided that, if the contractor failed to comply with the conditions thereof, the architect should be entitled to take possession of the building: *Held*, that this right did not depend upon the mere arbitrary discretion of the architect, but, in an action for damages by the contractor for such interference by the architect, the issue whether he had so fulfilled his contract was one which he was entitled to have tried.—*White v. Harrigan*, Minn., 43 N. W. Rep. 89.

15. CORPORATIONS — Ultra Vires. — Where a corporation agrees to repay a loan of money made to it in preferred stock, to be subsequently issued, and it is afterwards ascertained that the corporation had no power to issue such stock, the lender of the money may maintain an action against the corporation for its return, although it was unauthorized before the trial to issue preferred stock to the stockholders proportionately to their stock. — *Anthony v. Household Sewing-Machine Co.*, R. I., 18 Atl. Rep. 178.

16. COVENANTS—Damages. — When covenants of title in a deed are broken as to a part of the land conveyed, the damages are such portion of the purchase money and interest as the value of that part bears to the value of the whole land, measured by the price paid. — *Winnepiseogee Paper Co. v. Eaton*, N. H., 18 Atl. Rep. 171.

17. CRIMINAL LAW— Robbery. — Where an indictment for robbery charges the taking of a pistol, the property of one K, and on the trial K and V claim the pistol, there is no variance, but a conflict of evidence which is properly left to the jury to determine.—*People v. Anderson*, Cal., 22 Pac. Rep. 139.

18. CRIMINAL PRACTICE — Challenging Jury. — Where the challenge of the territory to a juror is improperly sustained, but it appears that "a jury of good and lawful men was sworn to try the case," there is no ground for a new trial; as defendant's right to challenge is the right to reject, not the right to select, a juror. — *Territory v. Roberts*, Mont., 22 Pac. Rep. 132.

19. DEED— Parol Evidence. — Plaintiffs sought to recover land in possession of defendant, which they alleged had been set apart to them as a homestead. They offered to prove that the deed of defendant was given by them as security for a debt which had been

paid before suit brought. The declaration did not allege fraud in procuring the deed: *Held*, that plaintiffs, as parties to the deed, were estopped to deny it under Code Ga. § 3809, which provides that a deed absolute on its face, and accompanied with possession, shall not be proved (at the instance of the parties) by parol evidence to be a mortgage only, unless fraud in its procurement is the issue to be tried.— *Mitchell v. Fullington*, Ga., 9 S. E. Rep. 1083.

20. DEED—Reformation.—A deeded to D lot 1, pointing out to him lot 2 as the one conveyed. A had no title to either of the lots. D entered upon lot 2, and subsequently sold it to W, conveying to him lot 1. W entered upon lot 2 and was evicted: *Held*, that a bill by D against A to reform the deed so as to describe lot 2 would not lie, as A had no title to either lot.— *Daggett v. Ayer*, N. H., 18 Atl. Rep. 169.

21. DESCENT AND DISTRIBUTION. — H left a will; of which defendant was executor and S residuary legatee. S also made defendant her executor, and complainant, defendant's wife, her residuary legatee. Defendant administered on both estates, and converted many of the assets, taking leases, deeds, mortgages, and assignments of property belonging to or purchased with funds of the estates in his own name, or as executor. Complainant petitioned the probate court to decree to defendant all the assets of H's estate, and to decree to complainant all of the residuary estate of S, without finding the amount in defendant's hands under either will, and stating that she accepted the property without inventory, and exonerated defendant from all further liability. The court decreed according to her prayer: *Held*, that the decree was conclusive on complainant, who could thereafter claim nothing except under the decree. — *Sowles v. Witters*, (U. S. C. C.) Vt., 39 Fed. Rep. 403.

22. DESCENT AND DISTRIBUTION.— Gen. Laws N. H. ch. 202, relating to the interest by curtesy of the husband in the land of the wife, provides, in § 16, that if the wife die without issue, and the husband has no estate by the curtesy, he shall be entitled in fee to one-half of her land: *Held*, that this provision is not affected by Laws 1879, ch. 37, which provides that a husband who abandons his wife for three years shall not be entitled to her estate by the curtesy. — *Martin v. Swanton*, N. H., 18 Atl. Rep. 170.

23. DIVORCE — Final Judgment. — In an action for divorce and alimony, an order for judgment and decree is a final determination of the issues involved, from which an appeal will lie; and the appointment thereafter of a referee to ascertain the amount and character of the community property is a proceeding to carry the judgment into effect, and any orders in relation thereto are themselves the subjects of appeal.— *Sharon v. Sharon*, Cal., 22 Pac. Rep. 131.

24. DIVORCE—Desertion.—If a wife leaves her husband without cause, and with intent to throw off her marital duty, and afterwards realizes that she done wrong, and would return if the way was opened for her, but her husband refrains from doing anything to induce her to return, for the purpose of making her absence the ground of a suit for divorce, her desertion in such a case is neither obstinate, nor against her husband's will, and cannot, therefore be made the basis of a decree of divorce. — *Newing v. Newing*, N. J., 18 Atl. Rep. 166.

25. EVIDENCE — Parol. — Where plaintiff gave an unconditional bill of sale for 153 cattle, including those in dispute, to one L, evidence of a contemporaneous parol agreement by which the terms of the written contract were materially changed is not admissible.—*Scarbrough v. Alcorn*, Tex., 12 S. W. Rep. 72.

26. EVIDENCE.— In the second trial of an action one of the plaintiff's testified that a list of the claims was given plaintiffs' attorney, and was used on the first trial of the cause; and that witness had not seen it since the trial. The attorney testified to receiving the list; that it was used on the first trial, and that it was put among the papers of the cause; and that he had not seen it since: *Held*, that secondary evidence of its contents was admissible. — *Ramsey v. Hurley*, Tex., 12 S. W. Rep. 56.

27. EXECUTORS AND ADMINISTATORS. — The statute (Revision, p. 758, § 28) requires that letters of administration shall issue to the next of kin in preference to a stranger.—*Donahay v. Hall*, N. J., 18 Atl. Rep. 163.

28. FALSE IMPRISONMENT. — Under Code Crim. Proc. Tex. tit. 5, ch. 1, requiring that a person arrested without a warrant shall have an immediate hearing before the nearest magistrate, where the petition in an action for false imprisonment alleges that plaintiff was arrested without warrant, and was imprisoned without an examination, and these allegations are not contradicted, a judgment for defendants cannot be sustained. —*Newby v. Gunn*, Tex., 12 S. W. Rep. 67.

29. FEDERAL COURTS—Practice. — Under Rev. St. U. S. §§ 648, 649, making all issues of fact in the circuit court triable by jury except in proceedings in equity, bankruptcy, admiralty, and in cases of maritime jurisdiction, an action of book-account can be tried only by a jury, though § 914 provides that the practice in the federal courts shall be similar to that in the courts of the State in which the case is tried, and the action mentioned is triable under the State practice only by auditors. — *Sulzer v. Watson*, (U. S. C. C.) Vt., 39 Fed. Rep. 414.

30. GUARDIAN AND WARD.—After the death of a minor under guardianship, the county court cannot order a sale of property of the estate to pay the debts, and has only jurisdiction, in the matter of guardianship, to receive and act on the guardian's final account, and order the estate turned over to the person entitled to receive it.—*Alford v. Halbert*, Tex., 12 S. W. Rep. 75.

31. HOMESTEAD—Exemption.— A sheriff had collected money due a husband and wife on an execution for the sale of land under a vendor's lien, and refused to pay it over, alleging that he had applied it in payment of an execution against the husband. The land sold under the vendor's lien was the homestead of the parties, the proceeds of which they had intended to apply to the purchase of another homestead: *Held*, that the sale of the homestead, in the absence of a law authorizing an exchange or transfer of homestead, was a voluntary conversion of the exempt property into money, which at once became subject to execution. — *Mann v. Kelsey*, Tex., 12 S. W. Rep. 43.

32. HOMESTEAD IN WIFE'S SEPARATE ESTATE. — Civil Code Cal. § 1262, provides that, if the selection of a homestead is made from community property, the land, on the death of either spouse, vests in the survivor. Section 1401, declares that on the death of the wife the entire community property, except such as has been set apart to her by judicial decree, belongs to the husband without administration. Code Civil Proc. Cal. § 1474, provides that the homestead of married persons, on the death of one of the spouses, goes to the survivor. Section 1475 makes it the duty of the superior court to set it apart to the survivor. Petitioner is the surviving husband of a wife who died without issue. During her life-time a homestead was selected from community property. After her death the petitioner sold the land, and now asks that a homestead be set apart to him from her separate estate: *Held*, that the land, which vested in petitioner absolutely on the death of his wife, was still a homestead, and, having disposed of it, he has exhausted his homestead right.— *In re Ackerman's Estate*, Cal., 22 Pac. Rep. 141.

33. HUSBAND AND WIFE—Separate Property. — In an action by a husband for the recovery of the separate property of his wife, the fact that such property was purchased with money arising from land limited to the wife for life, and to her children after her death, does not affect her right thereto for her life nor to the possession thereof, nor are the children necessary parties to the action, and exceptions to an answer, pleading non joinder of the children, were properly sustained.— *Millikin v. Smoot*, Tex., 12 S. W. Rep. 59.

34. INJUNCTION—Bond.— Defendants sureties on a

treasurer's bond, prayed relief from a judgment and execution against them on such bond, on the ground that their attorneys had failed to show that they signed the bond on condition that two other responsible persons should sign it, whose signatures the principal and one of the county commissioners promised but failed to procure, and that the bond was accepted by the county commissioners' court without their knowledge that such signature had not been obtained: *Held*, that as the defense would have been unavailable in the suit on the bond, the proceedings on the judgment will not be enjoined. — *Ballow v. Wichita County*, Tex., 12 S. W. Rep. 48.

35. INSURANCE—Fraud.—In an action to collect money due on a fire insurance policy, the clauses of which provided that "any fraud, or attempt at fraud, or any false swearing on the part of the assured, shall cause a forfeiture of all claim under this policy," if the insured was guilty of willful fraud or false swearing, the warranty was broken, and he could not recover.—*Lion Fire Ins. Co. v. Starr*, Tex., 12 S. W. Rep. 45.

36. JUDGMENT — Foreclosure. — A judgment for foreclosure of a mortgage recited its date and the date of the note for security of which it was given as of May 4, 1885, when the date of both was April 4, 1885. The petition alleged the proper date. The mortgage was attached to and made a part of the petition; and the note was introduced as evidence: *Held*, that the recital of the date of the note and mortgage was not a necessary part of the judgment, and should be treated as clerical error, it appearing from the whole record, with reasonable certainty, that the judgment was rendered in the cause of action set up in the petition. — *Hague v. Jackson*, Tex., 12 S. W. Rep. 63.

37. JUDGMENT—Foreclosure.—A sale of land, to satisfy a judgment on foreclosure, though made under an execution issued after the death of the mortgagor, cannot be avoided in a collateral proceeding, where there has been no administration on the estate. — *Thompson v. Jones*, Tex., 12 S. W. Rep. 77.

38. JUDICIAL SALES. — When a judgment of mortgage foreclosure is on appeal affirmed as to the sum found due, but reversed in so far as it directs the sale of certain land, the effect, as to such land, is to destroy the title of the mortgagee, acquired at a sale before the reversal under process issued on the judgment and directing the sale of the land decreed to be covered by the mortgage, including the land in question. — *Adams v. Odom*, Tex., 12 S. W. Rep. 34.

39. LEASE — Partnership. — Defendants, as partners, leased certain land of plaintiff for three years, and made cash payments thereon at different times. Some three months thereafter one of the partners, W, retired and the two remaining partners assumed all liabilities and notice thereof was duly published. At the end of the first year a balance of $1,896 was due on the rent, for which the new firm gave their note, but nothing was said about W, and no release given as to him by plaintiff. At the end of the second year the new firm gave up the land, being unable to pay the rent, and plaintiff rented it to a third person: *Held*, that W was not discharged from his liability for the rent by the acceptance of the note of the new firm until the surrender of the land by plaintiff's consent.—*White v. Boone*, Tex., 12 S. W. Rep. 51

40. LIMITATIONS OF ACTIONS. — An action on a promissory note payable in six months, and "given in part payment for a tract of land, to become due when a proper chain of title from the State" was recorded, brought more than ten years after the making thereof, but within ten days after a proper chain of title was recorded, is not barred by the statute of limitations, where it appears from the petition that it was the intention of the parties that the note was not to become due until the chain of title was recorded, and that the delay in recording was with the consent and acquiescence of the defendant.—*Robertson v. Cates*, Tex., 12 S. W. Rep. 54.

41. MASTER AND SERVANT—Fellow-servant. — The engineer being a fellow-servant with plaintiff in defendant's employ, defendants are not liable for injuries sustained by reason of any negligence on the engineer's part.—*White v. Kennon*, Ga., 9 S. E. Rep. 1082.

42. MASTER AND SERVANT.—In a suit against a railroad company to recover damages for the death of an employee by a car drifting from a side track, it is errror to submit to the jury the question whether the side track was properly constructed, and with ordinary care. — *Twitchell v. Grand Trunk Ry. Co.*, (U. S. C. C.) N. H., 39 Fed. Rep. 419.

43. MECHANICS' LIENS. — S and J bought material of the plaintiffs herein, with which to erect the dwelling-houses described in their contract with B, failed to pay for the same, and subsequently forfeited and surrendered all their rights in the lots and houses to said B. Plaintiffs thereupon filed a verified statement for a lien, in which they asserted that the material was furnished by plaintiffs under a contract with S and J, who held a contract for a deed from the owner of the real estate, said B, "and for constructing three dwelling-houses, located on the premises;" and, further, that B, was the legal, and S and J the equitable, owners of the lots. There was no other allegation as to the purpose for which the material was furnished, nor was B connected with the construction of the houses in any other manner: *Held*, that the affidavit for a lien was insufficient.—*McGlauflin v. Beeden*, Minn., 43 N. W. Rep. 86.

44. MORTGAGE—Mistake. — Where a holder of a mortgage had foreclosed the same, and under a mistake as to the correctness of the proceedings, and the consequent validity of the foreclosure, had paid prior incumbrances which he was equitably entitled to have kept alive for his protection: *Held*, that equity would relieve from the mistake except as against innocent grantees and purchasers without notice, and allow him to be subrogated to the rights of the holders of such prior incumbrances. Mistakes as to the condition of one's title or the correctness or regularity of antecedent proceedings are frequently relieved from where the equity is clear, being properly classed with mistakes of fact. — *Gerdine v. Menage*, Minn., 43 N. W. Rep. 91.

45. MORTGAGE.—A husband and wife conveyed certain real estate to defendant by a deed absolute in form, but in fact as security for money loaned under a parol agreement for a reconveyance on payment of the debt. The grantors remained in possession and control of the property. The husband leased the premises, but not in the name of defendant, and received the rents, and there was no evidence that he acted as defendant's agent in so doing: *Held*, that defendant was not liable for any damage suffered through the misrepresentations of the husband, on leasing the premises, as to their condition. — *Tilden v. Greenwood*, Mass., 22 N. E. Rep. 45.

46. MORTGAGES— Parties.— Where the condition of a mortgage provides that defendant should pay to a bank certain promissory notes, and also pay or caused to be paid all sums then due, or to thereafter become due, to the depositors and creditors of said bank, it was not error in an action to foreclose the mortgages to allow an amendmant of the bill after demurrer to, on the ground that the depositers and creditors were necessary parties, by striking out the clause providing for payment of all sums due them.—*Witters v. Sowles*, Vt., 18 Atl. Rep. 191.

47. MORTGAGE — Foreclosure Sale. — A bill by a mortgagor to set aside a sale under foreclosure for fraud in conducting the sale, where the land was purchased by the mortgagee, is not demurrable because the complaint does not offer to redeem from the mortgage. — *Briggs v. Hall*, R. I., 18 Atl. Rep. 177.

48. MUNICIPAL CORPORATION—Nuisance.—Where a city has ample power to remove a nuisance, which it creates or permits to remain, it is liable for all the injuries resulting therefrom. — *City of Fort Worth v. Crawford*, Tex., 12 S. W. Rep. 52.

49. MUNICIPAL CORPORATION-CHARTER — Removal of Dangerous Building by City.—A city charter, which authorizes the mayor and council "to remove any forge, smithshop, or other structure within the city, when in their opinion it shall be necessary to insure against fire," confers a power which can only be used in case of absolute necessity or grave emergency; and it authorizes the mayor and council to remove a dangerous forge but not the building in which it is situated unless it appears that the building itself is dangerous.—*Dupree v. Mayor*, Ga., 9 S. E. Rep. 1085.

50. MUTUAL BENEFIT SOCIETIES.—A section of the defendant's constitution, regulating the manner of paying death claims out of a beneficiary fund, examined and construed.—*Jewell v. Grand Lodge A. O. U. W.* Minn., 43 N. W. Rep. 88.

51. NEGLIGENCE—Trespasser. — Plaintiff cannot recover for injures received by being struck by an engine while walking on the ends of the ties of a railroad track on a stormy night, with his hat pulled over his eyes, and "looking stright down."—*Gulf, etc. Ry. Co. v. York*, Tex., 12 S. W. Rep. 68.

52. NEGOTIABLE INSTRUMENT. — Where defendant, in an action on a promissory note, given for stock in an insolvent corporation, alleged that the agents of the payee falsely represented such corporation as solvent and in good financial condition, and that, confiding in the truth of these statements, he made and delivered said note, it was not error to permit him to state that he would not have purchased the stock but for the representations made to him. — *Pridham v. Weddington*, Tex., 12 S. W. Rep. 49.

53. PARENT AND CHILD—Minors.—Under act Cal. April 1, 1878, authorizing managers of orphan asylums to consent to the adoption of children under their care in the same manner that parents are authorized to consent to the adoption of minor children, under Civil Code Cal. ch. 2, an order of the superior court, authorizing the adoption of a minor child in the care of an orphan asylum, is not sufficient without the consent of the managers of the asylum.—*In re Chambers*, Cal., 22 Pac. Rep. 138.

54. PARENT AND CHILD.—Evidence of loose declarations made by plaintiff's father in his old age, that if plaintiff would take care of him he should be well paid, is entirely insufficient to prove a contract to pay for services naturally due from a child to its parent.—*Zimmerman v. Zimmerman*. Penn., 18 Atl. Rep. 129.

55 PLEADING.—Evidence in an action for a money balance alleged to be due after deduction certain payments, admitted in the complaint to have been made by defendants, where the complaint alleges that those payments only had been made, defendants may, under the general denial, give evidence of other payments. —*Brown v. Forbes*. Dak., 43 N. W. Rep. 93.

56. PUBLIC LANDS—Railroad Grants. — The congressional land grant act of March 3, 1857, was in itself a grant conveying to the State the legal title of the lands found to fall within its operation. The certification of lands to the State by the secretary of the interior under the law of 1854 did not affect the legal title of such lands. —*Weeks v. Brigman*, Min., 43 N. W. Rep. 81.

57. RAILROAD COMPANIES—Municipal Corporation.—The provisions in the charter of a street railroad company, authorizing it to construct and maintain its tracks "upon and over such streets" in the city, "except in" certain of the streets therein mentioned, "as shall from time to time be fixed and determined by the city council," are not to be construed to prevent the company from laying its tracks "across" one of the excepted streets.—*State v. Newport St. Ry. Co.*, R. I., 18 Atl. Rep. 161.

58. RAILROAD CORPORATIONS—Receivers. — Rev. St. Tex. art. 1198, § 21 provides that suits against railroad corporations may be brought in any county in which the railroad extends or is operated. Act April 2, 1887, provides that if the property sought to be put into the hands of a receiver is a corporation whose property lies within the state, the suit to "have a receiver appointed shall be brought in this State in the county where the principal office of said corporation is located." *Held*, that the district court of S county, through which the road of a railroad corporation extended, had authority to appoint a receiver for such corporation, though the principal office of the corporation was in A county.— *Bonner v. Hearne*, Tex., 12 S. W. Rep. 38.

59. RES JUDICATA.—An action against an administrator to recover the value of lands sold by him as such under latters alleged to have been fraudulently procured cannot be maintained after a judgment revoking said letters of administration has been previously reversed on appeal in an action for that purpose.—*Halbert v. Alford*, Tex., 12 S. W. Rep. 77.

60. TELEGRAPH COMPANY—Damages. — Plaintiff, who had purchased a flock of sheep, which he wished to drive to his ranch, directed a telegram to a servant to meet him at a certain place and "bring Shep," (meaning a sheep dog on the ranch). The message was delivered so as to read "bring sheep." The servent accordingly drove plaintiff's sheep from the ranch to meet him. In an action for damages to the newly purchased sheep, additional expense in keeping them, and for loss, exposure, and injury to both flocks, etc., plaintiff alleged that when he sent the dispatch he informed defendant's agent in charge of its office that he wanted the dog to assist in driving the sheep to his ranch: *Held*, that defendant had direct notice of the object of the dispatch, and was chargeable with notice of all attendant details, and liable for negligence in transmitting the message.—*Western Union Telegraph Co. v. Edsall*, Tex., 12 S. W. Rep. 42.

61. TRESPASS—Crime.—Pub. St. R. I. ch. 204, § 22, provides that trespass shall not lie for an injury to plaintiff's person, reputation, or estate, caused by the commission of a crime, until after criminal proceedings have been begun against the offender, unless in cases where such actions could be maintained at common law: *Held* that, in a suit against defendant for performing an abortion on plaintiff's daughter, causing her death, plaintiff could not recover for loss of service consequent on the death without showing criminal proceedings begun, but could recover for loss of services and expenses previous to her death, such damages being recoverable at common law, there being no evidence that deceased was quick with child, and the offence at common law being therefore only a misdemeanor.—*Arnold v. Gaylord*, R. I., 18 Atl. Rep. 177.

62. WATERS AND WATER COURSES. — Under the language of the California constitution as it existed prior to 1879, where the State, for public purposes, turns or straightens the channel of a river where it emties into another river, so that the land on the opposit side is, five years afterwards, injured or destroyed by the increased velocity of the current, such damage is not a "taking" of land for public use, and does not entitle the owner to compensation.—*Hoogland v. State*, Cal., 22 Pac. Rep. 142.

63. WATER AND WATER COURSES.—In the suit to restrain interference with a water-right, a finding that defendant's grantor told the orator's grantor that if he would dig at a certain place, and find water, he might lay logs and conduct it to his land, that he did so, understanding that he had been given the right to the water; and the orator and his grantor had, under that right, continued to take water uninterruptedly and openly for 15 years,—justifies a decree that orator had acquired a prescriptive right to take the water, and could replace the logs, when worn out, by a lead pipe.—*Blain v. Ray*, Vt., 18 Atl. Rep. 189.

64. WITNESS—Deposition. — A person who is a party to an action is also a competent witness therein, and his disposition may be taken in his own behalf in any of the cases specified in paragraph 814, Hill's Code, applicable to the circumstances or condition of such witness. *Roberts v. Parrish*, Oreg., 22 Pac. Rep. 136.